United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 9279

AT LAW.

ELIAS A. OLSON, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

No. 9280

AT LAW.

RANDOR G. KARLSON, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

No. 9281

AT LAW.

HARRY BREWSTER, APPELLANT,

vs.

UNITED STATES OF AMERICA, APPELLEE.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED AUGUST 10, 1931.

INDEX.

	Original	Print
Caption to Transcript from U. S. District Court	1	1
Petition in Condemnation Proceedings	3	2
Order allowing Amendment of Petition	8	6
Amended Petition	10	7
Order appointing Commissioners, etc	15	11
Report and Award of Commissioners	17	13
Notice of Appeal by United States of America from Award of Commissioners in connection with Easements, Nos. 86, 87, 147, 247, 248 and 252	20	15
Notice of Appeal by Randor G. Karlson from Award of Commissioners in connection with Easements, Nos. 86 and 87	22	16
Notice of Appeal by Elias A. Olson from Award of Commissioners in connection with Easement No. 147	23	17
Notice of Appeal by Harry Brewster from Award of Commissioners in connection with Easement, No. 247	24	18
Notice of Appeal by Harry Brewster from Award of Commissioners in connection with Easements Nos. 248 and 252	25	19
Bill of Exceptions	26	20
Caption	28	21
Recital of Consolidation of Cases	28	21
Testimony for Petitioner	29	22
Adolph F. Meyer	29	22
Testimony for Respondents	32	24
Bernhard A. Arnesen	32	24
Adolph F. Meyer (Respondents' Exhibit 34)	35	27
Clarence H. Nelson (Respondents' Exhibit 35)	52	40
W. E. King (Respondents' Exhibit 42)	53	41
Gardner S. Williams (Respondents' Exhibit 43)	58	45
Linus Landby (Respondents' Exhibit 44)	74	57
Theodore F. Spreiter (Respondents' Exhibit 45)	76	58
Barney Arneson (Respondents' Exhibit 46)	78	60
H. M. Heneman (Respondents' Exhibit 47)	86	66
Halvor Robberstad (Respondents' Exhibit 48)	91	70
John A. Kennedy (Respondents' Exhibit 49)	94	73
George C. Newton (Respondents' Exhibit 50)	97	75
H. C. Habstritt (Respondents' Exhibit 51)	108	83
Gardner S. Williams and George C. Newton (Respondents' Exhibit 55)	112	86
William Rulien	116	90
Harry Brewster	122	94
Elias A. Olson	123	96
Randor G. Karlson	126	99
Respondents' Exhibits	133	104
5, Deed, R. M. Skinner to W. E. McGuire, February 21, 1930	133	104
6, Warranty Deed, Anna McCagherty to Lenus Landby, May 26, 1924	133	105
7, Warranty Deed, Frank Decker to Albertina Franson, August 27, 1928	133	105
8, Quit Claim Deed, Russell J. Kidder to John F. Kidder, November 19, 1930	133	105
9, Warranty Deed, Ole S. Swanson to Emma Smith, January 2, 1926	133	105

	Original	Print
10, Warranty Deed, William H. Ringling to Ole Meland, October 6, 1927	134	106
11, Warranty Deed, Clair A. Lockrem to L. S. Darbyshire, March 16, 1928	134	106
1, Application of St. John River Power Company for Permission to construct permanent works, etc., and Order thereon.	137	108
32, Arguments before International Joint Commission on question of Regulating level of Waters of Lake of Woods	146	115
33, Brief of C. J. Rockwood, Counsel for Minnesota and Ontario Power Company, et al., presented to International Joint Commission on question of Regulating level of Waters of Lake of Woods	149	118
36, Editorial from Manitoba Free Press of City of Winnipeg, of June 3, 1922	154	121
P. C. Bullard	156	123
Respondents' Exhibit 58, Annual Report of Chief of Engineers, U. S. Army for 1930	156	123
Further Testimony for Petitioner	156	123
E. E. Corry	156	123
Adolph F. Meyer	158	125
Instructions to Jury requested by Respondents and overruling thereof	159	125
Court's Charge to Jury	161	126
Verdict and Judgment as to Elias A. Olsen, February 13, 1931	171	134
Verdict and Judgment as to Randor G. Harlson, February 13, 1931.	172	134
Verdict and Judgment as to Harry Brewster, February 13, 1931	173	135
Approval of Bill of Exceptions by District Judge	174	135
Amendments of Bill of Exceptions	175	136
Testimony for Petitioner	176	137
Edwin E. Corry	176	137
Petitioner's Exhibits 9 and 10, Boundaries of Reservations, etc.	186	145
Adolph F. Meyer	194	152
Petitioner's Exhibits	207	163
3, Map showing lands bordering on Lake of Woods	207	163
11, Map of Ceded Territory from Red Lake Band of Chippewa Indians pursuant to Act of Congress of January 14, 1889	208	165
12, Certified copies of Homestead Application, etc., of Elias A. Olson, etc	209	167
Certificate of Assistant Commissioner of General Land Office	209	167
Homestead Application of Elias A. Olson	210	169
Affidavit of Elias A. Olson	211	173
Letter, P. S. Smith to Martin Widstern, September 11, 1923.	212	175
Application of Elias A. Olson for Amendment	212a	177
Affidavit of Orsliff Hansen	213	179
Withdrawal of Elias A. Olson of part of Application for Amendment	214a	185
Relinquishment of Portion of entry	216	187
Testimony of Claimant, Elias A. Olson	216a	189
Final Affidavit of Claimant, Elias A. Olson	219	195
Testimony of Witness, Walter Nelson	220	197
Testimony of Witness, Olaf Johnson	223	203
18, Certificate of P. M. Larson, Register of General Land Office at Cass Lake, Minnesota, January 15, 1931	226	209

	Original	Print
19, Certificate of P. M. Larson, Register of General Land Office at Cass Lake, Minnesota, January 7, 1931	227	209
25, Tabulation Based upon data contained in Petitioner's Exhibits 18, 19 and 20, with reference to homestead entries, Patents, etc., for the years 1897 to 1930	228	213
29, Deed, Lloyd Henry Harrison to Harry Brewster, February 14, 1923	229	215
33, Deed, Richard C. Edwards and Wife to John R. Morris, et al., August 12, 1915	232	217
40, Deed, Andrew Johnson, Administrator, to Andreas Strandenas, June 6, 1925	234	219
50, Deed, Alfred F. Green to Randor G. Karlson, August 10, 1921	236	221
60, Division I of Canada's Representation	239	223
Statement by I. R. Stone with reference to shore line of Lake of Woods	241	223
Letter, L. V. Rorke to J. T. Johnston, December 3, 1929	244	225
Statement of W. S. Gliddon	247	227
61, Division II of Canada's Representation	248	227
Lac Seul Conservation Act, 1928	250	227
Manitoba Natural Resources Act, 1930	251	229
62, Division V of Canada's Representation	252	230
British North America Act, 1867	254	230
Manitoba Act, 1870	255	231
Dominion Lands Act	255	232
Manitoba Natural Resources Act	255	232
Indian Act	256	233
Ontario Public Lands Act	256	233
63, Division VI of Canada's Representation	257	233
British North American Act, 1867	259	234
Navigable Waters Protection Act	259	234
Boundary Waters Treaty of 1909	259	234
International Boundary Waters Treaty Act	260	235
64, Division VII of Canada's Representation	261	236
Agreement of June 22, 1928, between Kewatin Power Company and the Crown	263	237
Dominion Order in Council of January 21, 1919	263	237
Ontario Order in Council of February 13, 1919	264	238
Lake of the Woods Control Board Acts, 1921 and 1922	264	238
Lake of the Woods Regulation Act, 1921	266	240
Dominion Order in Council of September 21, 1921	267	242
Lac Seul Conservation Act, 1928	268	243
Proclamations bringing into effect Lake of Woods Control Board Act, 1921, and Lac Seul Conservation Act, 1928	268	243
Dominion Order in Council, June 20, 1928	268	243
Ontario Order in Council, June 27, 1928	269	244
Lake of the Woods Treaty of 1925	269	244
65, Supplement to Division VII of Canada's Representation.	270	245
Agreement between Kewatin Power Company and Minister of Interior of Canada, December 11, 1924	271	245
66, Division VIII of Canada's Representation	276	248
Dominion Lands Act	278	248
Letter, J. B. Challies to Deputy Minister, September 1, 1915.	278	249

	Original	Print
Letter, Agent of Dominion Lands at Winnipeg to J. B. Challies, September 21, 1915	279	249
Memorandum, J. B. Challies to N. O. Cote, February 24, 1916.	279	250
Letter, F. S. Checkley to J. B. Challies, April 7, 1916	279	250
Dominion Order in Council of March 27, 1922	279	250
Ontario Public Lands Act	280	251
Letter, J. B. Challies to Beniah Bowman, November 24, 1920.	280	252
Letter, Beniah Bowman to J. B. Challies, November 30, 1920.	281	252
Letter, L. V. Rorke to J. T. Johnston, November 27, 1929	282	253
67, Division VIII-A of Canada's Representation	283	253
Electricity and Fluid Exportation Act	285	254
Regulations under Electricity and Fluid Exportation Act	285	254
Dominion Water Power Act	285	255
Regulations under Dominion Water Power Act	285	255
Resolution of House of Commons of Canada, June 15, 1925	285	255
Manitoba Water Power Act	286	255
Proclamation bringing into force Manitoba Water Power Act.	286	255
Letter, Ontario Minister of Lands and Forests to Minister of Interior, November 30, 1929	286	255
68, Division XII of Canada's Representation	287	256
Boundary Water Treaty of 1909	289	256
International Boundary Waters Treaty Act	290	258
Dispatches between Canadian and United States Governments, April 24, 1919, to April 19, 1922	290	258
Lake of the Woods Convention of 1925	291	258
69, Division XIII of Canada's Representation	293	260
Indian Act	295	261
Map showing Number and Location of Indian Reserves bordering on Lake of the Woods in Canada	296	263
97, Letter, Adolph F. Meyer to I. K. Lewis, February 2, 1931.	297	265
Approval of Amendments of Bill of Exceptions by District Judge.	298	265
Motion for Transmission of Certain Original Exhibits to Appellate Court and Order granting same	310	276
Praecipe for Transcript on behalf of United States of America	314	279
Petition for Appeal on behalf of Elias A. Olson	317	280
Order allowing Appeal to Elias A. Olson	318	281
Memorandum as to Amended Assignment of Errors	319	282
Bond on Appeal	320	282
Citation on behalf of Elias A. Olson and Admission of Service	323	284
Order of U. S. Circuit Court of Appeals as to Consolidation of Cases, etc	325	285
Order extending time for filing Designations of Portions of Record, etc	328	287
Order for Transmission to U. S. Circuit Court of Appeals of Printed Volume entitled "Arguments on the reference by the United States and Canada in re Levels of the Lake of the Woods," etc.	329	288
Election as to Printing of Record	330	289
Order extending time to file Transcript	331	289
Amended Praecipe for Transcript by Elias A. Olson, et al	332	289
Clerk's Certificate to Transcript	334	291
Motion of Harry Brewster, et al., for Consolidation of Cases on Appeal, etc	335	292
Order of U. S. Circuit Court of Appeals as to Consolidation of Cases, etc	336	293

	Original	Print
Motion of Elias A. Olson, et al., for extension of time to file Designation of Portions of Record	341	295
Order of U. S. Circuit Court of Appeals extending time for Elias A. Olson, et al., to file Designation of Portions of Record	344	296
Motion of Elias A. Olson, et al., for Leave to file Amended Assignment of Errors	347	296
Notice of Motion for leave to file Amended Assignment of Errors	350	297
Order of U. S. Circuit Court of Appeals granting leave to file Amended Assignment of Errors	352	297
Amended Assignment of Errors	1	299
Order of U. S. Circuit Court of Appeals granting leave to Elias A. Olson to attach Appendix to brief, etc	140	409
Proceedings in U. S. Circuit Court of Appeals in Causes Nos. 9279, 9280 and 9281	411	411
Appearance of Counsel for Appellant in Cause No. 9279	411	411
Appearance of Counsel for Appellee in Cause No. 9279	411	411
Appearance of Counsel for State of Minnesota in Cause No. 9279	412	411
Appearance of Counsel for the Government of Canada in Cause No. 9279	412	412
Appearance of Counsel for Appellant in Cause No. 9280	413	412
Appearance of Counsel for Appellee in Cause No. 9280	413	412
Appearance of Counsel for State of Minnesota in Cause No. 9280	414	413
Appearance of Counsel for the Government of Canada in Cause No. 9280	414	413
Appearance of Counsel for Appellant in Cause No. 9281	415	413
Appearance of Counsel for Appellee in Cause No. 9281	415	414
Appearance of Counsel for State of Minnesota in Cause No. 9281	416	414
Appearance of Counsel for the Government of Canada in Cause No. 9281	416	414
Order of Argument in Causes Nos. 9279, 9280 and 9281	417	415
Order of Submission in Causes Nos. 9279, 9280 and 9281	418	415
Opinion in Causes Nos. 9279, 9280 and 9281	419	416
Judgment in Cause No. 9279	445	439
Judgment in Cause No. 9280	446	440
Judgment in Cause No. 9281	447	440
Clerk's Certificate to Transcript	448	441
Order allowing certiorari, Case No. 580		443
Order allowing certiorari, Case No. 581		443
Order allowing certiorari, Case No. 582		443

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1933, of said Court, before the Honorable Kimbrough Stone and the Honorable Wilbur F. Booth, Circuit Judges, and the Honorable A. Lee Wyman, District Judge.

Attest:

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the tenth day of August, A. D. 1931, a transcript of record pursuant to appeals allowed by the District Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in certain causes wherein Elias A. Olson was Appellant and the United States of America was Appellee, and wherein Randor G. Karlson was Appellant and the United States of America was Appellee, and wherein Harry Brewster was Appellant and the United States of America was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

United States District Court, District of Minnesota, Sixth Division.

Transferred to Fifth Division.

United States of America, Petitioner,

vs.

Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondent.

In the matter of the Appeal of United States of America, Petitioner, and of Harry Brewster, Respondent, from the award of the Commissioners heretofore appointed herein in connection with the tracts and easements numbered 247, 248 and 252, as set forth in said award.

And

United States of America, Petitioner,

vs.

Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner, and of Randor G. Karlson, Respondent, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 86 and 87, as set forth in the said award.

And

United States of America, Petitioner,

vs.

Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, petitioner, and of Elias A. Olson, Respondent, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 147, as set forth in the said award.

2 Appearances.

Lewis, Hunt & Palmer, Duluth, Minnesota.

C. E. Berkman, Chisholm, Minnesota.

John A. Hougen, Crookston, Minnesota.

Lewis L. Drill, United States Attorney, St. Paul, Minnesota.

Donald D. Harries, Special Assistant United States Attorney, Duluth, Minnesota.

D. N. Lindeman, of United States War Department, Duluth, Minnesota.

Chester S. Wilson, Assistant Attorney General of Minnesota, St. Paul, Minn.

T. L. Corey, Counsel for Dominion of Canada, Ottawa, Canada.

Pleas in the United States District Court, District of Minnesota, Fifth Division, in the above entitled cause.

Be It Remembered that on the 19th day of July, A. D. 1929, there was filed in the office of the clerk of said court, at his office in the City of Fergus Falls, said District and Sixth Division thereof, and thereafter transferred to his office in the city of Duluth, Minnesota, said District and Fifth Division thereof, Petition in Condemnation Proceedings, which is in words and figures following, to-wit:

3 I.

Petition in Condemnation Proceedings.

In the District Court of the United States for the District of Minnesota, Sixth Division.

United States of America, Petitioner,
539 vs. Law.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Harry Brewster, Randor G. Karlson, Elias A. Olson, Respondents, et al.

Now Comes The United States of America and petitions this Honorable Court and alleges:

I.

That heretofore, on the 24th day of February, 1925, the United States entered into and concluded a convention and

protocol with his Brittanic Majesty in respect of the Dominion of Canada for regulating the level of the Lake of the Woods and certain of the waters tributary thereto. That in Article 8 of said treaty, it was provided:-

"Article 8.

A flowage easement shall be permitted up to elevation 1064 sea level datum upon all lands bordering on Lake of the Woods in the United States, and the United States assumes all liability to the owners of such lands for the costs of such easement."

That thereafter and on or about the 17th day of July, 1925, the said treaty was approved by the Senate of the United States and promulgated by the President.

II.

Thereafter, by an Act of Congress approved by the President May 22nd, 1926, amended by an act of Congress approved by the President April 18th, 1928, it was provided that the Secretary of War acquired by purchase or
4 condemnation in accordance with the provisions of An Act of Congress entitled "An act to authorize condemnation of land for sites of public buildings, and for other purposes", approved August 1, 1888, and in accordance with the constitutional provisions of the State of Minnesota which provide that private property shall not be taken, destroyed or damaged for public use without just compensation therefor first paid or secured, the flowage easements up to elevation one thousand and sixty-four sea-level datum upon all lands in such State bordering on the Lake of the Woods, Warroad River, and Rainy River, and such lands or interests therein as are necessary to provide for the protective works and measures in such State along the shores of the Lake of the Woods and the banks of the Warroad and Rainy Rivers.

III.

That thereafter and prior to the 26th day of January, 1928, the Secretary of War of the United States endeavored to acquire by purchase the flowage rights referred to in said Convention and hereinafter described, but was unable to do so because of unreasonable prices demanded by the owners thereof or the unsatisfactory condition of the titles thereto, and on the 26th day of January and the 16th day of May, 1928, requested the Attorney General of the United States to acquire such flowage rights by condemnation proceedings

in accordance with said Act of Congress, and in pursuance to said request the Attorney General of the United States has directed the United States Attorney for the District of Minnesota, in which lie all of the lands upon which easements are so to be acquired, to institute condemnation proceedings to acquire a flowage easement up to elevation 1064 sea-level datum.

IV.

That the raising of the level of said Lake and the waters tributary thereto as provided for in said Convention, and the acquirement of the flowage easements necessitated by said Convention and provided for therein and in the said Acts of Congress will affect the tracts of land hereinafter described upon all of which this petitioner in order to fulfill its obligations under said treaty seeks hereby to acquire forever the full, complete and perpetual right, power and privilege to over-flow all that portion thereof which lies below elevation 1064 sea-level datum and which would be overflowed by a raising of the water in the said lake to that datum, be the consequences thereof to said tracts what they may. The term "sea-level datum" as used herein and in the aforesaid Convention means the datum permanently established by the International Joint Commission at the town of Warroad, Minnesota, as represented by the following bench mark: "Top of copper plug in concrete block carried below frost line, and located near fence in front of and to the west of new schoolhouse. Established October 3, 1912. Elevation, sea-level datum, 1068.797."

That the Engineers of the United States Army, acting for the Secretary of War, have numbered the tracts of land subject to over-flow by the Lake of the Woods and its tributary streams when raised as authorized by said Convention, and for convenience of reference, the said tracts are herein numbered with the same numbers as those adopted by the said Engineers.

V.

That the following are tracts of land so affected and so to be subjected to flowage easement with the names of the owners appearing of record or known to this petitioner as defined by the Statutes of the State of Minnesota and upon all of which a flowage easement is required up to sea-level datum 1064 as herein defined:

Easement	Description of Tract affected	Approximate acres thereof below elevation 1064	Owner
********			
Nos. 86 and 87.	Lots One (1) and Two (2) and the South half (S½ of the Northeast quarter (NE¼) of Section 5 (5), Township One hundred sixty-two (162), North of Range Thirty-five (35)	163.65	Randor G. Karlson The State of Minnesota and the County of Roseau and the Township of Laona claim liens upon said premises on account of unpaid taxes thereon and the County of Roseau also claims a lien thereon for a ditch assessment.
* * * *			
No. 147	Lots One (1) and Two (2) and the Southwest Quarter (SW¼) of the Northwest Quarter (NW¼) of Section Twenty-five (25), and Lot One (1) and the Southeast Quarter (SE¼) of the Northeast Quarter (NE¼) of Section Twenty-six (26), Township One Hundred Sixty-eight (168) North of Range Thirty-four (34)	55.21	Elias A. Olson By homestead entry only.
* * * *			
No. 247	Lot Three (3) of Section Twenty-six (26), Township One Hundred sixty-six (166) North of Range Thirty-five (35)	32.15	Harry Brewster By homestead entry only
No. 248 & 252	Lot Four (4) and the Southeast quarter (SE¼) of the southeast quarter (SE¼) of Section Twenty-six (26), Lot One (1) and the Northeast quarter (NE¼) of the Northeast quarter (NE¼) of Section Thirty-five (35), Township One Hundred sixty-six (166), North of Range Thirty-five (35)	66.4	Harry Brewster
* * * * *			

Wherefore, Your Petitioner prays for a judgment in these proceedings that it acquire the perpetual easement, right and privilege as against all the respondents and against all per-

sons or parties whatsoever, to overflow all that part of
7 the lands hereinbefore described up to elevation 1064 sea-level datum and which would be overflowed by a raising of the level of the Lake of the Woods to that level; that such shall be determined to be necessary and authorized by law; that three disinterested commissioners be appointed by this court to ascertain and report the amount of damages that will be sustained by the several owners on account of such taking; that said order fix the time and place of the first meeting of said commissioners and prescribe their compensation and direct that they proceed according to law and with all convenient speed to make a separate assessment and award of damages which will result to each of the owners of the tracts of land above described by reason of such taking and report the same to this court under their hands. That the court make suitable provision for satisfying or otherwise disposing of all tax liens and assessments, mortgages, judgments and other incumbrances upon and interests in said lands, and in all cases where for any reason it be doubtful to whom the award should be paid, that it be paid to the Clerk of this Court to be paid out under direction of this Court, and for such other relief as may be appropriate in the premises.

Dated July 18, 1928.

(Signed) CHARLES LORING,
Special Assistant United States Attorney,
District of Minnesota, Polk County, State Bank Building, Crookston, Minnesota.

Endorsed: Filed July 19, 1928, Joel M. Dickey, Clerk, By L. A. Levorsen, Deputy.

Order Allowing Amendment of Petition.

8 In the District Court of the United States for the District of Minnesota—Sixth Division.

United States of America, Petitioner,
539 vs. Law
Various Tracts of Land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al, Respondents.

This matter came regularly on for hearing by the Court at a Special Term thereof held in the Federal Building in the City of Saint Paul, on October 27, 1930, at 2 o'clock P. M., pursuant to adjournment from the morning session of

the Court. The motion before the Court was on the part of the United States for leave to amend the petition herein. Lewis L. Drill, United States Attorney, Donald D. Harries, Special Assistant United States Attorney, and D. N. Lindeman, Esquires, appeared on behalf of the United States; T. L. Cory, Esquire, appeared on behalf of the government of Canada; I. K. Lewis, Julius J. Olson and C. E. Berkman, Esquires, appeared on behalf of certain respondents.

The Court having heard argument and being advised in the premises

It is ordered, that the petition herein may be and is hereby amended by striking therefrom paragraphs I, II, III,
9 IV and X and the prayer for relief, and in lieu thereof substituting the paragraphs set forth in the attached amended petition so that the petition of the United States of America as amended shall read as shown on the attached amended petition, plus the names of parties, descriptions of lands affected and acreage below elevation 1064 sea-level datum as alleged in the original petition.

By the Court.

JOHN B. SANBORN,
Judge.

Dated at St. Paul, Minnesota, this 6th day of December, 1930.

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10 Amended Petition.

In the District Court of the United States for the District of Minnesota—Sixth Division.

United States of America, Petitioner,
vs. Law 539
Various Tracts of Land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al, Respondents.

Now comes the United States of America and petitions this Honorable Court and alleges:

I.

That heretofore on the 24th day of February, 1925, The United States entered into and concluded a convention and protocol with his Brittanic Majesty in respect of the Dominion of Canada for regulating the level of the Lake of the

Woods and certain of the waters tributary thereto. That in said treaty it was provided:

"The level of the Lake of the Woods shall ordinarily be maintained between elevations 1056 and 1061.25 sea-level datum, and between these two elevations the regulations shall be such as to ensure the highest continuous uniform discharge of waters from the lake.

"During periods of excessive precipitation the total discharge of water from the lake shall, upon the level reaching elevation 1061 sea-level datum, be so regulated as to ensure that the extreme high level of the lake shall at no time exceed elevation 1062.5 sea-level datum."

That thereafter and on or about the 17th day of July, 1925, the said treaty was approved by the Senate of the United States and promulgated by the President.

II.

Thereafter, by an Act of Congress approved by the
11 President May 22, 1926, amended by an Act of Congress approved by the President April 18, 1928, it was provided that the Secretary of War acquire by purchase or condemnation in accordance with the provisions of an Act of Congress entitled "An Act to authorize condemnation of land for sites for public buildings, and for other purposes", approved August 1, 1888, and in accordance with the constitutional provisions of the State of Minnesota which provide that private property shall not be taken, destroyed or damaged for public use without just compensation therefor first paid or secured, the flowage easements up to elevation one thousand and sixty-four sea-level datum, as defined by and in accordance with and for the purpose of carrying out the provisions of said treaty, upon all lands in such State bordering on the Lake of the Woods, Warroad River and Rainy River, and such lands or interests therein as are necessary to provide for the protective works and measures in such State along the shores of the Lake of the Woods and the banks of the Warroad and Rainy Rivers.

III.

That thereafter and prior to the 28th day of October, 1929, the Secretary of War of the United States endeavored to acquire by purchase the flowage rights referred to in said Convention and hereinafter described, but was unable to do so because of unreasonable prices demanded by the owners thereof or the unsatisfactory condition of the titles thereto,

and has requested the Attorney General of the United States to acquire such flowage rights by condemnation proceedings in accordance with said Acts of Congress, and in pursuance to said request the Attorney General of the United States has directed the United States Attorney for the District of Minnesota, in which lie all the lands upon which easements are so to be acquired, to institute condemnation proceedings to acquire a flowage easement up to elevation 1064 sea-
12 level datum, as defined by and in accordance with and for the purpose of carrying out the provisions of said treaty.

IV.

That the raising of the level of said lake and the waters tributary thereto as provided for in said Convention, and the acquirement of the flowage easements necessitated by said Convention and provided for therein and in the said Acts of Congress, will affect the tracts of land hereinafter described, upon all of which this petitioner in order to fulfill its obligations under said treaty seeks hereby to acquire forever the full, complete and perpetual right, power and privilege to raise and regulate the levels of the Lake of the Woods in accordance with the provisions of the aforesaid treaty and in consequence of which to overflow and otherwise affect the lands hereinafter described by such raising and regulation of said waters in accordance with said treaty, be the consequences thereof to said tracts what they may. The term "sea-level datum" as used herein and in the aforesaid Convention means the datum permanently established by the International Joint Commission at the town of Warroad, Minnesota, as represented by the following bench mark: "Top of copper plug in concrete block carried below frost line, and located near fence in front of and to the west of new schoolhouse. Established October 3, 1912. Elevation, sea-level datum, 1068.797".

That the Engineers of the United States Army, acting for the Secretary of War, have numbered the tracts of land subject to overflow by the Lake of the Woods and its tributary streams when raised as authorized by said Convention, and for convenience of reference, the said tracts are herein numbered with the same numbers as those adopted by the said Engineers.

V.

That the following are tracts of land so affected and
13 so to be subjected to flowage easement with the names of the owners appearing of record or known to this

petitioner as defined by the Statutes of the State of Minnesota and upon all of which a flowage easement is required up to sea-level datum 1064 as herein defined.

X.

That the Village of Warroad, the Counties of Roseau and Lake of the Woods and the Townships of Moranville and Laona in Roseau County and the Township of Angle in Lake of the Woods County have highways and other real estate which will be subjected to overflow by raising of the level of said lake as provided for in said treaty and it is hereby sought to subject said highways and other property to a perpetual easement for such overflow.

XI.

That the State of Minnesota has a trunk highway known as Trunk Highway No. 11, which crosses the Village of Warroad, and the Townships of Moranville and Laona, a part of which lies below 1064 sea-level datum and will be overflowed by the raising of said lake, as herein stated, and it is hereby sought to subject said highway to a perpetual easement for such overflow.

XII.

That there may be respondents above named, who, unknown to this Petitioner, have deceased, and there may be other unknown persons who claim an interest in any or all of said lands, and in order that the rights and interests of such heirs and other persons may be subjected to the easement sought by the petitioner they are made parties hereto.

Wherefore, your petitioner prays for a judgment in these proceedings that it acquire the perpetual easement right and privilege as against all the respondents and against all persons or parties whomsoever to raise and regulate the levels of the Lake of the Woods in accordance with the provisions of the aforesaid treaty and in consequence of which
14 to overflow and otherwise affect the lands hereinbefore described by such raising and regulation of said waters in accordance with said treaty, be the consequences thereof to said tracts what they may; that such shall be determined to be necessary and authorized by law; that three disinterested Commissioners be appointed by this Court to ascertain and report the amount of damages which will be sustained by the several owners on account of such taking; that said order fix the time and place of the first meeting of said Commissioners and prescribe their compensation and direct

that they proceed according to law and with all convenient speed to make a separate assessment and award of damages which will result to each of the owners of the tracts of land above described by reason of such taking and report the same to this Court under their hands. That the Court make suitable provision for satisfying or otherwise disposing of all tax liens and assessments, mortgages, judgments and other incumbrances upon and interest in said lands, and in all cases where for any reason it is doubtful to whom the award should be paid, that it be paid to the Clerk of this Court, to be paid out under direction of this Court; and for such other relief as may be appropriate in the premises.

LEWIS L. DRILL,
United States Attorney, Federal Building, Saint Paul, Minnesota.

DONALD D. HARRIES,
Special Assistant U. S. Attorney, 1200 Alworth Building, Duluth, Minnesota.

Endorsed: Filed Dec. 10, 1930. Joel M. Dickey, Clerk. By J. L. Ketten, Deputy Clerk.

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15 Order Appointing Commissioners and Fixing Time and Place of Their First Meeting.

This matter having come duly on to be heard before the Court on notice and petition for the appointment of commissioners to appraise the damages which may be occasioned by the taking sought in the petition on file herein, Charles Loring, Esq., of Crookston, Minnesota, appearing as attorney for the petitioner, and T. L. Cory, Esq., of Ottawa, Canada, appearing for the Government of Canada, and E. C. Middleton, Esq., of Baudette, Minnesota, and C. E. Berkman, Esq., of Chisholm, Minnesota, appearing for various respondents herein; E. H. Morphy, Esq., Hector Baxter, Esq., for Canadian National Railway Company, Canadian Northern Railway Company, and Minnesota and Manitoba Railroad Company. Mr. A. L. Janes, Esq., by E. H. Morphy and Messrs. Baldwin, Baldwin, Holmes and Mayall for the Great Northern Railway Company, and the Minnesota & Great Northern Railway Company, A. G. Cherne for Emily Cugnet, Mr. A. M. Landby for School District number 12, Bert Hanson, Esq., for Joseph Berlinger, who also appeared personally; and Mr. Hans R. Selvog appeared personally, and upon due proof being filed of the service of notice of this hearing and it ap-

pearing to the Court that the taking sought in the petition is necessary and authorized by law,

It Is Ordered That the following named persons, residents of the Sixth Division in the District of Minnesota, namely Nels S. Hegnes of Argyle, Minnesota, Wm. M. Taber of Park Rapids, Minn. and G. I. Brandt, of Roseau, Minnesota, be, and the same hereby are, appointed commissioners to ascertain and report the amount of damages that will be sustained by the several owners of the tracts described in the petition on account of such taking. The First meeting of said commissioners shall take place on the 25th day of September, 1928, at 9:00 o'clock A. M., of said day, at the Court Room in the Federal Building in the city of Duluth, in the District of Minnesota.

It Is Further Ordered, that the compensation of each of said commissioners, including the amount which shall be allowed him for maintenance is hereby fixed at the sum of $20.00 per day for each day actually devoted to the work of such commission under this Order. In addition to the above compensation each commissioner shall be allowed his actual expenses incurred, and paid for transportation in performing his duties under this Order, including his expenses in coming to the City of Duluth for the first meeting of said commissioners on Tuesday, September 25th, 1928, and returning to his home therefrom, or going to such place as may be necessary for the further performance of his duties. All per diem charges and other items shall be approved by this court.

Dated at Duluth, Minnesota this 25th day of September, 1928.

This order and the foregoing appointments are made pursuant to the consent of the Government of the United States and of all respondents represented by Mr. C. E. Berkman and Mr. E. C. Middleton.

By the Court:

WM. A. CANT,
United States District Judge.

Endorsed: Filed September 25, 1928, Joel M. Dickey, Clerk, By L. A. Levorsen, Deputy.

17

III.

Report and Award of Commissioners.

To the court above named:

The undersigned Commissioners, appointed by this Court in the above entitled matter by order dated September 25th, 1928, do hereby report as follows:

1.

That on said 25th day of September, 1928, we qualified according to law and took and subscribed an oath as required by Statute and we met at the time and place appointed by the Court therefor, to-wit, at the Court Room in the Federal Building in the city of Duluth on said 25th day of September, 1928, and from there we adjourned from time to time and place to place giving the notice of such adjournment required by Statute and we carefully viewed and inspected each piece of land described in the petition and heard testimony publicly under oath, in regard to such land.

2.

We also report that we have appraised and assessed the damages to each of said tracts of land caused by the imposition of the easement thereon as sought by the petitioner, and have made an award of such damages as to each tract. That many of the parties to whom the award of damages should be made are not residents of the State and their place of residence is in some cases unknown to us and in some cases there are infants or persons under legal disability who own or claim some interest in the premises, and in many cases there are tax liens and other encumbrances, and in all cases we are doubtful to whom the award of damages should be paid and in consequence thereof we have made the award in gross as to each contiguous tract of land which is apparently under one ownership and used for a single purpose, so that the petitioner may pay such award to the Clerk of the above named Court to be paid out under the direction of the Court.

18

3.

We therefore find and award as damages to each tract of land herein described as a consequence of the easement imposed thereon by these proceedings the sum set opposite the number and description of such tract of land, the said award to be distributed to the owners, encumbrancers, lienors and occupants according to their respective interests in said premises and the priorities with respect thereto and in the absence of agreement under the direction of the Court;

19 Easement	Description of tract affected	Amount of Award
* * * *		
Nos. 86 and 87	Lots One (1) and Two (2), and the South half (S½) of the Northeast quarter (NE¼) of Section five (5), Township one hundred sixty-two (162), North of Range thirty-five (35) West.	The sum of $3660.00
* * * *		
No. 147	Lots One (1) and Two (2) and the Southwest quarter (SW¼) of the Northwest quarter (NW¼) of Section Twenty-five (25), and Lot One (1) and the Southeast quarter (SE¼) of the Northeast quarter (NE¼) of Section Twenty-six (26), Township one hundred sixty-eight (168); North of Range thirty-four (34) West.	The sum of $1296.50 The sum of $40.00 for damage to Dock and Wharf is included in the above.
* * * *		
No. 247	Lot Three (3) of Section twenty-six (26), Township one Hundred Sixty-six (166), North of Range Thirty-five (35) West.	The sum of $640.70
No. 248 & 252	Lot Four (4) and the Southeast quarter (SE¼) of the Southeast quarter (SE¼) of Section twenty-six (26), Lot One (1) and the Northeast quarter (NE¼) of the Northeast quarter (NE¼) of Section Thirty-five (35), Township One Hundred sixty-six (166), North of Range thirty-five (35) West.	The sum of $3195.80
* * *		

NELS S. HEGNES
WM. M. TABER
G. I. BRANDT
Commissioners

Dated May 4, 1929.

Endorsed: Filed May 4, 1929, Joel M. Dickey, Clerk, By Frances V. Levorsen, Deputy.

IV.

Notice of Appeal by Petitioner From the Award of Said Commissioners Made in Connection With Easements 86-87, 147, 247, and 248-252.

To the Clerk of the above named Court and

To the respondents above named who are interested as owners or otherwise in the tracts and awards hereinafter described and to the occupants of said tracts.

You Will Please Take Notice That the United States of America, the petitioner above named, hereby appeals from the awards of damages hereinafter set out and which awards were made by the Commissioners heretofore appointed in this proceeding to appraise and report the damages to the various tracts of land involved herein on account of the easement sought by the Petitioner and whose report was filed herein on the 4th day of May, 1929, and notice of the filing thereof delivered to the Petitioner on the 5th day of May, 1929, and which said awards of damages are appealed from on the ground that they and each of them as hereinafter set out are excessive and that each award exceeds the actual legal damage to the tract in favor of which it is assessed by the the said Commissioners in their report and opposite which, as hereinafter specifically described, such award is set out.

Each award appealed from, together with the specific description of the property and the number of the easement as set out in the petition in favor of which the award was made, is as follows:

Easement	Description	Award
Nos. 86 and 87	Lots One (1) and Two (2), and the South half (S½) of the Northeast quarter (NE¼) of Section Five (5), Township One hundred sixty-two (162), North of Range Thirty-five (35) West.	$3,660.00
No. 147	Lots One (1) and Two (2), and the Southwest Quarter (SW¼) of the Northwest quarter (NW¼) of Section Twenty-five (25), and Lot One (1), and the Southeast quarter (SE¼) of the Northeast quarter (NE¼) of Section twenty-six (26), Township One Hundred sixty-eight (168), North of Range Thirty-four (34) West.	$1,296.50 The sum of $40.00 for damage to Dock and Wharf is included in the above.

No. 247	Lot Three (3) of Section Twenty-six (26), Township One hundred sixty-six (166), North of Range Thirty-five (35) West.	$640.70
Nos. 248 and 252	Lot Four (4) and the Southeast Quarter (SE¼) of the Southeast quarter (SE¼) of Section twenty-six (26), Lot One (1) and the Northeast quarter (NE¼) of the Northeast quarter (NE¼) of Section Thirty-five (35), Township One Hundred sixty-six (166), North of Range Thirty-five (35) West.	$3,195.80

For the petitioner,

(Signed) LEWIS L. DRILL
United States Attorney,
St. Paul, Minnesota.

(Signed) CHARLES LORING
Special Assistant United States Attorney, Crookston, Minnesota.

Endorsed: Filed June 3, 1931, Joel M. Dickey, Clerk, By Frances V. Levorsen, Deputy.

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22 V.

Notices of Appeal from the Award of Said Commissioners Filed by Respondent Randor G. Karlson.

#86 and 87

To the United States of America, the petitioner in the above entitled proceedings:

You will please take notice that Randor G. Karlson, et al., one of the parties herein appeals to the District Court of the United States, for the District of Minnesota, 6th Division, from the award of $3660.00 made by the Commissioners in the above entitled proceedings made to Randor G. Karlson as the owner of the following described property:

Easement No. 86 and 87

Lots 1 and 2, and S½ of NE¼, Sec. 5, T. 162, R. 35.

Randor G. Karlson alleges that he was at the time of the institution of the proceedings herein, the owner in fee simple, of the said property and ever since has been the owner thereof.

The grounds of this appeal are that the award of $3600.00 for the taking of a flowage easement in the above described property is grossly inadequate.

The nature of his claim is that he has sustained damages by the taking of said property in the sum of $8000.00 and the amount of his claim for the taking is last named sum.

The report of the commissioners in making the award herein referred to was filed in the above Court on May 5th, 1929.

Dated at Chisholm, Minn. June 5, 1929.

(Signed) RANDOR KARLSON,
Owner.

(Signed) C. E. BERKMAN,
Attorney for owner of the above described property.

Endorsed: Filed June 19, 1929. Joel M. Dickey, Clerk. By Frances V. Levorsen, Deputy.

23

V.

Notices of Appeal from the Award of Said Commissioners Filed by Respondent Elias A. Olson.

147

To the United States of America, the petitioner in the above entitled proceedings:

You will please take notice that Elias A. Olson, one of the parties herein appeals to the District Court of the United States, for the District of Minnesota, 6th Division, from the award of $1296.50 made by the Commissioners in the above entitled proceedings made to Elias A. Olson as the owner of the following described property:

Easement No. 147

Lots 1 and 2 and SW¼ of NW¼ of Sec. 25, and Lot 1 and SE¼ of NE¼ of Sec. 26, T. 168, R. 34.

Elias A. Olson alleges that he was at the time of the institution of the proceedings herein, the owner by homestead entry, of the said property and ever since has been the owner thereof.

The grounds of this appeal are that the award of $1296.50 for the taking of a flowage easement in the above described property is grossly inadequate.

The nature of his claim is that he has sustained damages by the taking of said property in the sum of $3500.00 and the amount of his claim for the taking is last named sum.

The report of the commissioners in making the award herein referred to was filed in the above Court on May 5th, 1929.

Dated at Chisholm, Minn.

ELIAS A. OLSON, Owner,

C. E. BERKMAN,
Attorney for owner of the above described property.

Endorsed: Filed Apr. 28, 1931. Joel M. Dickey, Clerk. By Frances V. Levorsen, Deputy.

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24 V.

Notices of Appeal from the Award of Said Commissioners Filed by Respondent Harry Brewster.

No. 247

To the United States of America, the petitioner in the above entitled proceedings:

You will please take notice that Harry Brewster, one of the parties herein appeals to the District Court of the United States, for the District of Minnesota, 6th Division, from the award of $640.00 made by the Commissioners in the above entitled proceedings made to Harry Brewster as the owner of the following described property:

Easement No. 247

Lot 3 of Sec. 26, T. 166, R. 35

Harry Brewster alleges that he was at the time of the institution of the proceedings herein, the owner by homestead entry, of the said property and ever since has been the owner thereof.

The grounds of this appeal are that the award of $640.00 for the taking of a flowage easement in the above described property is grossly inadequate.

The nature of his claim is that he has sustained damages by the taking of said property in the sum of $2000.00 and the amount of his claim for the taking is last named sum.

The report of the commissioners in making the award herein referred to was filed in the above Court on May 5th, 1929.

Dated at Chisholm, Minn.

(Signed) HARRY BREWSTER,
Owner.

(Signed) C. E. BERKMAN,
Attorney for owner of the above described property.

Endorsed: Filed Jun. 10, 1929, Joel M. Dickey, Clerk. By Frances V. Levorsen, Deputy.

25

V.

Notices of Appeal from the Award of Said Commissioners Filed by Respondent Harry Brewster.

248
(and 252)

To the United States of America, the petitioner in the above entitled proceedings:

You will please take notice that Harry Brewster, one of the parties herein appeals to the District Court of the United States, for the District of Minnesota, 6th Division, from the award of $3195.00 made by the Commissioners in the above entitled proceedings made to Harry Brewster as the owner of the following described property:

Easement No. 248

Lot 4 and SE¼ of SE¼ of Sec. 26, Lot 1 and NE¼ of NE¼ of Sec. 35, T. 166, R. 35.

Harry Brewster alleges that he was at the time of the institution of the proceedings herein, the owner in fee simple, of the said property and ever since has been the owner thereof.

The grounds of this appeal are that the award of $3195.00 for the taking of a flowage easement in the above described property is grossly inadequate.

The nature of his claim is that he has sustained damages by the taking of said property in the sum of $7000.00 and the amount of his claim for the taking is last named sum.

The report of the commissioners in making the award herein referred to was filed in the above Court on May 5th, 1929.

Dated at Chisholm, Minn., June 5, 1929.

HARRY BREWSTER, Owner,

C. E. BERKMAN,
Attorney for owner of the above described property.

Endorsed: Filed Jun. 19, 1929. Joel M. Dickey, Clerk. By Frances V. Levorsen, Deputy.

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26 Bill of Exceptions

as amended by order of Court, Sanborn, J.

Dated July 30, 1931.

27 United States District Court, District of Minnesota, Sixth Division.

Transferred to 5th Division

Law #539

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents

In the matter of the Appeal of United States of America, Petitioner-Respondent, and of Harry Brewster, Respondent-appellant, from the award of the Commissioners heretofore appointed herein in connection with the tracts and easements numbered 247, 248-252, as set forth in said award.

and

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents

In the matter of the Appeal of United States of America, Petitioner-Respondent and of Randor G. Karlson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 86-87, as set forth in the said award.

and

United States of America, Petitioner,

vs.

Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents

In the matter of the Appeal of United States of America, Petitioner-Respondent, and of Elias A. Olson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 147, as set forth in the said award.

28 Be It Known and Remembered That this action was brought on for trial at the regular term of said Court adjourned from the Sixth Division to the Third Division, by agreement between Court and counsel for the convenience of all parties, at the Federal Building, in the City of St. Paul on the 22nd day of January, 1931, before the Court, Hon. John B. Sanborn, District Judge presiding, and a jury. Messrs. C. E. Berkman, I. K. Lewis and John H. Hougen appeared on behalf of Respondents-Appellants, Chester S. Wilson, Esq., Assistant Attorney General appeared on behalf of the State of Minnesota, H. M. Ferroe, Esq., appeared on behalf of the Rural Credit Bureau, associated with Chester S. Wilson, Esq., Messrs. Lewis L. Drill, United States Attorney, and Donald D. Harries, Special Assistant United States Attorney appeared on behalf of the United States, D. N. Lindeman, Esq., of the United States War Department appeared on behalf of the United States, and T. L. Cory, Esq., appeared on behalf of the Dominion of Canada.

The cases being called for trial, by agreement of parties there was an order of the Court that said three cases be tried together, and that all evidence, and all offers of proof be regarded as having been offered and received in each of the three cases; and that only one record be made for all three cases, and that a separate verdict be returned in each case.

After the jury was regularly impaneled there was a statement by Donald D. Harries, Esq., Special Assistant United

States Attorney on behalf of the United States, and it was made to appear to the Court and Jury that the appeals involved herein arise out of condemnation proceedings brought by the United States to acquire by such condemnation proceedings a flowage easement up to contour 1064 sea level datum on respondent-appellant's lands, pursuant to Act of Congress approved by the President May 22, 1926, and
29 amended by an Act of Congress approved by the President April 18, 1928, which said Acts of Congress were enacted for the purposes of carrying into effect the Treaty of February 24, 1925, concluded between the United States and his Britannic Majesty in respect of the Dominion of Canada for regulating the level of the Lake of the Woods.

Commissioners were regularly appointed by the United States District Court pursuant to petition filed by the Government, awards of compensation and damage were filed by said commissioners, and appeals from said awards were conducted by the government and by respondents, owners of said lands. Said appeals were regularly brought on for trial, as stated on the foregoing page.

The principal question involved on said appeals was the measure of compensation and damage.

The United States, as petitioner, in order to make clear to the Court and Jury the location of the property on which the government seeks to acquire the easement in question called as a witness ADOLPH F. MEYER, who identified the level and outflow of the Lake of the Woods. That the Norman dam was completed in 1898 and that the stop logs were installed in November of that year. That the outflow and the level of the lake is regulated and determined by the number of stop logs that are placed in the sluices of the Norman Dam. That the regulation made possible by the Normal Dam has caused an average rise in the levels of the Lake of approximately three feet above the natural levels of the lake.

Mr. Meyer further testified that ever since the year 1898 when the Norman Dam was built the water of the Lake of the Woods has been controlled and raised to approximately the same extent as it is at the present time. That respondents' lands and all lands forming the Lake of the
30 Woods reservoir have been flooded throughout the years from 1898 to the present time to substantially the same extent as they will be flooded under the easement being acquired by the government, pursuant to treaty regu-

lations. That the flowage easement now being acquired by the Government has been imposed on respondents' lands, and on the shore lands of the Lake of the Woods ever since 1898 substantially as it will be in the future under the treaty regulation. That this condemnation proceeding by the Government is not a part of a development proposition for some project that is to come up in the future, but that it is a proceeding to condemn a flowage easement imposed upon the lands in question, ever since 1898.

That the use of respondents' lands for flowage purposes is absolutely necessary for the formation and operation of the reservoir contemplated by the International Joint Commission, and that all of the lands on which the government is condemning the flowage easement have formed a part of the Lake of the Woods reservoir ever since 1898.

Mr. Meyer further testified that it was a part of the function of the International Joint Commission to inquire into the different uses to which he lands adjoining the Lake of the Woods were adapted, and that such an inquiry was conducted. That Mr. Meyer himself investigated and considered the uses for which said lands were available and suited, and that he found that said lands were suited for two principal uses,—one for agriculture and the other a "use for flowage purposes". That the International Joint Commission considered which was the more valuable, and that Mr. Meyer gave a great deal of study and investigation to that question and reported thereon to the International Joint Commission. That he has made a study of quite a number of reservoirs, both in Minnesota and elsewhere, and that he considered himself competent to determine the most
31 valuable use to which said lands may be devoted. On that subject Mr. Meyer testified:

"It is my conclusion that the lands around the Lake of the Woods are more valuable for flowage purposes than for agricultural purposes. By that I mean that their use value is greater for reservoir purposes.

By Mr. Harries:

Q. Mr. Meyer, in speaking of the use to which the lands are to be put, and making a comparison of the value of such uses, do you have in mind the market value, or the value of the use, or what I might call the utility value, or the economic value, or could you explain that to us?

A. I have in mind the use value of the land.

Mr. Meyer further testified that it would not be possible to build a dam in the Lake of the Woods anywhere in the

United States that would in any way regulate the level of the lake, or create a reservoir in said lake in aid of navigation, because there is no outlet of the Lake of the Woods within the boundaries of the United States where it would be practicable to build a dam across the Lake of the Woods.

Mr. Meyer further testified:

"[A]. And for what purposes are the waters of the Lake of the Woods used primarily?

A. The waters themselves are primarily used for power development, for fishing, for navigation purposes, for the use of summer resorters, some for domestic and sanitary purposes. The City of Winnipeg gets its water supply from an arm of the Lake of the Woods."

That there were no power plants in the Winnipeg River before the Norman Dam was built. That the Norman Dam was built for power purposes, and that the Lake of the Woods storage reservoir was created for power purposes at that time.

That the Keewatin Power Company, a Canadian corporation, built the Norman Dam, and that its stockholders, for the most part, are citizens of the United States. That the control of the level and outflow of the Lake of the Woods is exercised exclusively by the Norman Dam.

Mr. Meyer testified also that so far as he knows no flowage easements have been bought or sold on the Lake of the Woods, as flowage easements.

32 Mr. Meyer was then asked to testify as to the power resources on the Winnipeg River and the relation of the Lake of the Woods thereto. There was an objection by the government to the introduction of any evidence tending to show that lands in question had any additional value because of the fact that they formed a part of the Lake of the Woods storage reservoir.

BERNHARD A. ARNESEN was called as a witness on behalf of the respondents. Immediately after this witness was sworn the government counsel asked leave of court to state the government's objection to the testimony previously sought to be adduced by respondent and which the government anticipated would be supported by cumulative testimony of this witness relating to reservoir values of lands on the shores of the Lake of the Woods. The court granted government counsel permission to state the government's objection to such

testimony and they were set before the court by the following proceedings:

By Mr. Harries:

The Government of the United States objects to the admission of any evidence concerning any of the following:

1. The availability of respondents' lands as part of the reservoir contemplated under the treaty between the United States and Canada.

2. The uses and benefits of storage of water in the Lake of the Woods.

3. Water power sites on the Winnipeg River or elsewhere.

4. Values of respondents' lands based upon their use in whole or in part as a part of such storage basin.

5. The anticipation of buyers of shore lands that reservoir uses ever had enhanced or ever would enhance the value of their lands.

In connection with the foregoing objection government counsel stated 35 grounds for such objections. These grounds of objection are set forth, herein at page ....., line ..... to page ....., line ... ([marginal] page 36, line 1,—[marginal] page 42, line 28 of typewritten transcript of Bill of Exceptions proposed by appellant), in connection with the government's objections to written offers on the part of respondents to prove certain facts by means of the testimony of Adolph F. Meyer.

Following said objections, and the grounds thereof, as stated by Mr. Harries, Mr. Lewis, on behalf of respondents, made a lengthy presentation to the Court of the rules of law on which respondents relied and of the facts which respondents were prepared to prove. Among other things Mr. Lewis stated to the court that respondents were prepared to prove that their lands had been used as a part of the Lake of the Woods storage reservoir for more than thirty years before the commencement of these condemnation proceedings, and that the lands below contour 1064, to which class respondents' lands belong, were more valuble than lands above contour 1064. That there has been no market in the usual and accepted sense of that term for flowage easements but that lands which are useful and available for storage and reservoir purposes are more valuable than lands which are not so available; and that lands which are useful and available for storage and reservoir purposes have

been bought and sold for a larger price than would have been paid for them except for that fact.

On behalf of respondents it was further stated to the court that the easement being acquired by the government is
33 not a speculative, uncertain project which will become valuable only by the acquisition and use of the easement, and the investment of capital in connection therewith, but that on the contrary respondents' lands and the easement imposed thereon, have been in actual use in the development of hydro-electric power for approximately 30 years. That large investments have been made in connection therewith; that the industry is, and for many years has been, well established and prosperous.

Upon the argument on the government's motion to strike the testimony of William Rulien respondents further stated to the court that under the Treaty of 1909 entered into between the United States and Canada, they had a cause of action against the Canadian interests which had been using their lands for storage and reservoir purposes, and that their claim was based upon the fair rental value of their lands for storage and reservoir purposes. That the condemnation proceedings instituted by the government terminated respondents' said rights against said Canadian interests, and that the damage or compensation to which respondents were entitled was the fair rental value of their lands for storage and reservoir purposes.

Respondents stated that their witnesses were present in court, prepared to testify in accordance with the oral statements made, and in accordance with the facts recited in the written offers of proof hereinafter set forth. Respondents urged that the court hear their said witnesses as a basis for the court's ruling on the question of the measure of compensation and damage, but it was the court's opinion that the question could best be presented on appeal by his excluding all evidence which in any way tended to prove that respondents' lands had any additional value solely because of the fact that they formed a part of the Lake of the Woods storage reservoir.

34 (Counsel for the respondents made the following additional statement immediately succeeding the statement last above described:

Mr. Lewis: Well, these are not to be regarded as offers of proof.

The Court: No, it is assumption of fact as the basis of your argument.)

The court sustained the government's objection to the introduction of such evidence, and an exception was duly noted by respondents.

In order to raise and squarely present the principle question of law involved in said proceeding it was moved by petitioner and ordered by the court that respondents be required to submit offers of proof, in writing, setting forth the facts which respondents claim entitle them to recover the value of their land as a part of the Lake of the Woods storage reservoir.

It is further ordered that respondents' several offers to prove certain facts by a number of different witnesses may be submitted in the form of written exhibits, and that said exhibits and written offers be considered in all respects as though each witness were on the stand, sworn to testify, as set forth in said respective exhibits.

It was also agreed between counsel and ordered by the court that an exception be saved and noted, on behalf of all parties, to each and every adverse ruling of the court.

It was agreed between counsel and ordered by the Court that in respondents typewritten offers of proof herein contained each separate paragraph or offer to prove of the several offers to prove by each of said witnesses, be regarded as a separate offer to prove, so that in the event that any given exhibit containing several offers to prove should contain inadmissible matter in any one or more offers, that fact would not operate to exclude other offers to prove contained in said exhibit which might otherwise be admissible.

Thereupon respondents submitted and offered in evidence respondents' Exhibit 34, the same being respondents' offer to prove certain facts as set forth in said exhibit by said
35 witness Adolph F. Meyer.

Said Exhibit 34, the government's objection thereto, and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

"ADOLPH F. MEYER.

"Respondents offer to prove by the witness Adolph F. Meyer that there are opportunities for the development of

hydroelectric power at the outlets of the Lake of the Woods and in the Winnipeg River, which developments will derive substantial benefits from the utilization of the water storage of the Lake of the Woods reservoir, at the following sites:

Outlet of Lake of the Woods, with a head of 22 feet;

White Dog Falls and Boundary Falls, with a head of 45 feet;

Point Dubois, with a head of 46 feet;

Slave Falls, with a head of 26 feet;

Seven Sisters, with a head of 66 feet;

McArthur Falls, with a head of 18 feet;

Great Falls, with a head of 56 feet;

Pine Falls, with a head of 37 feet.

That the total concentrated head of all of the site is 316 feet.

Mr. Harries: Subject to the right to make additional objections, with respect to the matters contained in the three additional pages, which counsel has just handed to the government counsel, the United States objects to the reception of the testimony of Adolph F. Meyer upon the grounds stated in those two sheets attached to the copy of Mr. Meyer's testimony, which are now presented to the reporter.

(Document marked General Government's Exhibit 98 for identification by the reporter.)

The Government objects to each item of the foregoing proposed offer of proof by respondents upon each of the following grounds as to each item of such offer or proof:

36 The objection on the part of the United States to the admission of such evidence is made upon the following grounds:

1. That such evidence is incompetent, irrelevant and immaterial.

2. That such testimony is highly speculative and conjectural for the following reasons:

(a) It erroneously assumes as an existing fact fixed costs of plant site, operation, personal, taxes and finances without basis other than conjecture and speculation.

(b) It assumes as a fact the full development of the power which such a reservoir is capable of producing and

also erroneously assumes a market for the said power so assumed to be developed as a result of the assumed use of said basin and respondents land as a part thereof.

(c) It assumes the earning of large profits from the use of the power so assumed to be developed and used.

(d) It assumes the practicability of uniting in one ownership approximately 1573 separate parcels of land without the exercise of eminent domain.

(e) It erroneously assumes the full development of all the power of which said reservoir is capable and also the constant employment of the same on a basis of fixed profit.

(f) It excludes the use of said power which said body is capable of producing under full development for municipal or other public purposes on a cost basis or small margin of profit.

37 3. That no sufficient foundation has been laid for the introduction of said testimony.

4. That such testimony does not go to the true measure of damages in this case; namely, the difference in market value of the property affected by the easement before and after such easement is imposed.

5. That such testimony presupposes and assumes a state of the titles to the said lands at variance with the status thereof at the time of the condemnation; that is to say, at the date of the filing of the awards of the Commissioners.

6. That respondents have not sustained the burden of first proving the practicability of unifying shore ownerships, as required by law.

The Government further objects to any such evidence upon the further grounds:

1. The multiplicity of titles to lands affected by petitions of the Government for condemnation pursuant to the treaty between the United States and Canada makes it utterly impracticable as a matter of law to unite them for reservoir purposes, except through the intervention of the power of eminent domain.

(a) The physical magnitude of the project embracing 78,081 acres of land distributed along a shore line of over 1500 miles of mainland shoreline, the ownership of which is reposed in approximately 850 recorded fee owners of lands in the United States of whom many have died, leaving unknown

heirs, or have disappeared to parts unknown, and approximately 723 private owners in the Province of Ontario, render the exercise of the power of eminent domain the sole
38 practical means of so regulating or lawfully affecting the levels of the lake.

2. Similarly, the multiplicity of titles to the land affected in this proceeding, pursuant to the said treaty between the United States and Canada makes it utterly impracticable as a matter of fact to unite them for reservoir purposes save by eminent domain.

3. The ownership by the United States of a vast acreage ranging from approximately 50,000 acres when the lands in question were first opened for entry to 11,000 acres of land at the time the present proceedings were instituted rendered it impossible for any private interest to acquire and exercise a lawful right to flood the margins of the lake or otherwise control its levels.

(a) The homestead law, (43 U. S. C. A. Sec. 162) Provides that lands in the public domain must be taken for the purpose of actual settlement and not for speculation.

(b) The Act of Congress of January 14, 1889, entitled, "An act for the relief and civilization of Chippewa Indians in the State of Minnesota," (25 statutes at large 644) provides that the agricultural lands acquired under the act "shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law."

4. That the ownership of a large part of the lands necessary for such reservoir and owned by the Province of Ontario, the policy of which province is opposed to the acquisition of any exclusive right of control of power sites and said lake levels, render it extremely unlikely, if not wholly
39 impossible, to acquire flowage rights on the Canadian shore.

5. That the shore lands bordering on the Lake of the Woods have been continuously subject to four separate governmental jurisdictions until July 15, 1930, and since that date subject to five governmental jurisdictions, each charged with the duty of protecting its own interests therein and to preserve and perform its own administrative policies, making it wholly impracticable for private interests to acquire flowage rights thereon.

6. That the Lake of the Woods is international and navigable boundary water, the right to regulate and control which

reposes solely in the United States and the Dominion of Canada.

7. That under the laws of the Dominion of Canada the Lake of the Woods, at least to the extent thereof within the boundary of the Dominion of Canada, is wholly subject to the jurisdiction of the Dominion Government for the protection of navigation thereof.

8. That structures on the Lake of the Woods outlets controlling the regulation of the lake have been under governmental control from 1898 to the present time for the protection of navigation and this physical control of such outlets by a governmental agency in the interest of one of its prime functions, precludes the possibility of control of the lake levels by any other agency or interest.

9. The Lake of the Woods has been subject to international commitment, regulation and control since the treaty of 1909 with Great Britain, which established the order of precedence of the various interests, with power in fourth place.

10. All Crown lands in the Provinces of Manitoba and Ontario were withdrawn in 1915 and 1920 from any disposition inconsistent with governmental control and regulations.

11. The Indian Act of the Dominion of Canada, requiring a majority consent from each band located on Indian reservations adjacent to said lake, of which there are forty in number, renders it wholly impracticable and unfeasible to contemplate successful negotiations with said Indian occupants leading to their consent to relinquishment of their reservations.

12. The interests on the part of those concerned in the level of the Lake of the Woods are varied and embrace navigation, fishing, lumbering, domestic and sanitary purposes and power and these interests require radically different stages and conditions of the levels of said lake, and because they are so radically different one from another they preclude the reasonable expectation that the same could be reconciled by any persons or concern other than governmental authority.

13. Respondents' testimony on the reservoir value is inadmissible until proof is made of a reasonable possibility of uniting in one person or firm.

(a) Power to unify shore ownership.

(b) Right to control the levels of the lake.

(c) Physical control of the outlets of the lake, each of which it is absolutely impracticable to so much as contemplate except by the joint action of the National Sovereignties having jurisdiction of the Lake of the Woods.

14. That it is impracticable as a matter of law for any power interest to unify ownership on the margin of said lake because of the law of the State of Minnesota (Sections 8076 and 8077, Mason's Minn. Stat. 1927), forbidding foreign interests to acquire more than 90,000 square feet of land in Minnesota.

On the ground that it conclusively appears that the regulation of the levels of said lake can be maintained or controlled only by governmental agency and by the exercise of the power of eminent domain. In connection with this ground objection in addition to other matters before the Court, there is called to the attention of the Court:

1. Section 10437, Mason's Minn. Stat. 1927, providing that to drain or attempt to drain in any manner any lake or body of water meandered by the United States is a gross misdemeanor, and also,

2. Article 2, Section 2 of the Constitution of Minnesota and the Enabling Act of 1857, page XII, Mason's Minn. Stat. 1927, to the effect that water forming boundaries with other states shall be common highways and forever free.

Further in this same connection, attention is called to the Acts of Congress approved June 7 and July 1, respectively, 1898, (30 Stat. 67, 571, 576) expressly reserving to the United States the right to flow the lands involved herein without any liability therefor to any person so acquiring said land thereafter.

Objection is further made to the introduction of such evidence for the reason that even if it be assumed that the said Acts June 7 and July 1, 1898, respectively, are impliedly repealed by the Treaty of 1925; we have this situation:

1. Immediately upon the going into effect of the Treaty of 1925 all possibility of unifying shore ownership, except by the United States in the exercise of eminent domain, was foreclosed.

42 2. But subsequent to 1898 and up to the signing of the treaty of 1925, the Acts of 1898 were certainly in full force and effect and expressly gave the United States the sole right to overflow the shore lands in aid of navigation. In the face of this existing right no other agency could have acquired a flowage right for any purpose from 1898 to the date of the Treaty; after which it was still true that no agency except the United States could acquire a flowage right.

The offer of testimony by the respondents is objected to further on the ground that the union of properties necessary for the project is so impracticable that the possibility of such union could not affect the market value or price.

The Government objects to all testimony relative to the acquisition of shore lands because of their supposed value for storage purposes. The ground of this objection is that it matters not whether one or ten or twelve of these good people, or one hundred, or all of them were deceived into the belief that they could acquire lands on the shore of the Lake of the Woods and thereby hope for some enhancement in their value on account of reservoir purposes—it matters not at all if all of them were deceived in that belief if as a matter of law that could not have taken place, and unification could not have been completed, and there was no buyer in the market who could ever have undertaken to acquire those lands.

Mr. Harries: 1. The Government objects to the admission of this testimony (1) upon the ground that no foundation has been laid for proof of the foregoing facts by this or other witnesses; (2) upon the ground that the witness has
43 not been qualified to testify to the foregoing facts; (3) upon all the grounds stated at the opening of court January 27, 1931, beginning at page 233 of the record, which said objections are identical with the objections as hereinbefore quoted beginning with line 1 on [marginal] page 36 and ending with line 3 on [marginal] page 43 of this typewritten transcript.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 2. Respondents further offer to prove by said witness that it is practicable to develop a total of about 325,000 electrical horse power on a 24 hour basis at the said site with the regulated outflow from Lake of the Woods.

Mr. Harries: 2. The Government objects upon all the grounds stated at the opening of court January 27, 1931, beginning at page 233 of the record; and upon the ground that it is immaterial what power could be developed with regulated outflow from the Lake of the Woods unless competent proof is first made of the practicability of using such power, by first establishing (a) the market; (b) the cost of marketing; (c) the cost of developing a market; (d) the cost of producing and (e) that there exists no source of cheaper power.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 3. Respondents further offer to prove by said witness that he knows the conditions in the regions in which it is practicable to distribute the electrical power generated at said power sites with respect to the existing demand and market, and the possible future demand and market for such power. That during 1929 and 1930 there was a demand and market for the entire output of all power plants
44 then in operation, and because of difficulty in supplying such demand the power interests were asking that power users economize in the amount of power consumed. That recently another power unit has been completed so that there is at present some surplus of power. That in his opinion, however, such surplus will all be taken up within a period of from three to five years, and that there will be a demand and market for all the power which can be developed at said sites within a comparatively short time.

Mr. Harries: 3. To this the Government objects that the same is purely speculative and conjectural, without adequate foundation; and wanting in proof of what power can now be developed from said sites.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 4-a. Respondents further offer to prove by said witness that during the course of his investigations as consulting engineer for the International Joint Commission he calculated what would have been the average dependable outflow of water from the Lake of the Woods at its outlets under natural conditions. That said average dependable outflow under natural conditions would have been from 6500 to 7000 cubic feet per second.

4-b. Respondents further offer to prove by said witness that he has determined what the average dependable outflow is and will be from the Lake of the Woods with the lake utilized as a storage reservoir and the waters controlled as contemplated by the treaty. Said average dependable outflow is and will be a little more than 10,000 cubic feet per second, making an increase of 3,000 or 3,500 cubic feet per second over the average dependable outflow under natural conditions.

45 4-c. Respondents further offer to prove by said witness that the continuous power that could be developed at the outlets of the lake, with the lake utilized as a storage reservoir and the waters controlled as contemplated by the treaty, would be increased, as compared with natural conditions, in the same relative proportion as the average dependable outflow, that is, about 50%.

Mr. Harries: 4-a-b-c. The Government objects to the admission of the testimony comprised in the three paragraphs last above written upon the ground that no proper foundation has been laid; there is no proof that the average dependable outflow under treaty control can be utilized at existing or future power sites; and upon the grounds stated beginning at page 233 of the record.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 5. Respondents further offer to prove by said witness that from his connection and experience with hydroelectric projects in general, and especially those at the outlets of the Lake of the Woods and in the Winnipeg River, and from his acquaintance with the value of the Lake of the Woods storage reservoir and the hydroelectric projects at the outlets of the Lake of the Woods and in the Winnipeg River, and from his acquaintance with the demands for power in the territory available to the interests or authorities operating or controlling said projects, he has formed an opinion as to whether such interests or authorities would seek to acquire the flowage rights and easements contemplated by the treaty of 1925 if said treaty had not been entered into and if said easements were not being acquired by the United States. That in his opinion said interests or authorities would seek to acquire such flowage rights and easements.

46 Mr. Harries: 5. The Government objects to the admission of the foregoing proffered testimony on the grounds (1) that it is speculative, conjectural and without any foundation; (2) that it is immaterial what any given interest would "seek" unless final validity in relation to power interests is established for the doctrine "seek and Ye shall find"; and upon the grounds stated by the Government beginning at 233 of the record.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 6. Respondents further offer to prove by said witness that the reasons for his opinion stated in the last preceding offer of proof are as follows: That it is impossible to utilize the storage possibilities of the Lake of the Woods reservoir without flooding the shore lands in the State of Minnesota. That the value of the Lake of the Woods as a storage reservoir in the development of continuous power is so great that considerations of economy and good business, as well as the desire on the part of interests or authorities owning or controlling the power projects to be secure in the use and enjoyment of said reservoir, would require the acquisition by them of the flowage and storage rights and easements on the shore lands in Minnesota.

Mr. Harries: 6. The Government objects to the admission of the foregoing testimony on the ground that it is too indefinite to be a proper subject of legal proof; is speculative and conjectural, without proper foundation; and further objects on all grounds stated by the Government beginning at page 233 of the record; and the testimony that it is impossible to utilize the storage possibilities of the Lake of the Woods reservoir without flooding the shore lands in Minnesota
47 is objected to as a false statement of what the witness would testify, and said witness Adolph F. Meyer established the falsity of said offer in an affidavit made part of this record in connection with this offer of proof.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 7. Respondents further offer to prove by said witness that from his experience and contacts with the acquisition and development of reservoir and power projects, he knows that there is an established custom and practice which is usually followed arriving at the fair market value of flow-

age and storage rights and easements where the same are sought to be acquired through negotiation and purchase, and that he knows what such custom and practice is.

Mr. Harries: 7. Proof of the custom and practice usually followed is objected to as immaterial to the issues of this case where the same were not followed and as a matter of law could not be carried out.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 8. Respondents further offer to prove by said witness that such custom and practice is as follows: That negotiations are carried on between the owner of the flowage rights and easements and the party desiring to acquire the same. That the owner is usually willing to sell but is not required to do so. The party desiring to acquire the easement is usually willing to buy but is not compelled to do so. Each party will exercise the best judgment that he possesses, based upon information he has, with the result that the parties will usually agree on a price which will be somewhere between the use value of the flowage right and easement to the pur-
48 chaser and the use value of the land to the landowner, which price will not be based on the needs of the purchaser or the profits which he will derive from the project nor on the value of the land to the owner but will represent a fair market value reached through negotiation and bargaining in the manner stated.

Mr. Harries: 8. The Government objects to the admission of the proposed testimony upon the grounds of objection last above stated; upon the ground that in this proceeding neither the use value of flowage rights nor use value of owners' lands is the true measure of damage; on the ground that the proposed testimony states a legal conclusion as to what constitutes fair market value.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 9. Respondents further offer to prove by said witness that from his knowledge and experience he has an opinion as to whether the fair market value of the flowage easements contemplated by the treaty of 1925 would have been arrived at and the title to said easements acquired by the interests or authorities operating or controlling the power projects through negotiation and purchase, if the treaty had not

been entered into and if the United States had not undertaken thereby to acquire such easements. That in his opinion the fair market value of said easements would have been arrived at and said easements acquired in the manner described in the last preceding offer of proof.

Mr. Harries: 9. The Government objects to the reception of the proposed proof upon the ground that it is not based upon the true measure of fair market value; that it assumes facts that are purely conjectural; and upon the ground that on the date of the Commissioners' awards in this proceeding and for four years prior thereto the treaty of 1925 pre-
49 cluded acquisition of easements by anyone other than the present condemnor.

The Court: The objection is sustained.

Mr. Lewis: 10. Respondents further offer to prove by said witness that in his opinion the title to said easements could and would have been acquired by the interest or authorities operating and controlling the power projects in accordance with the custom and practice described in the foregoing offers of proof. That the acquisitions of said easements by said interests or authorities could and would have been accomplished through the medium of subsidiary American corporation or other American agency acting on behalf of or co-operating with the Canadian interests or authorities.

Mr. Harries: 10. The Government objects to the admission of the proposed offer upon the ground that it is speculative and conjectural; upon the ground that it contains conclusions of law; and upon all grounds stated by the Government beginning at page 234 of the record, which said objections are set forth verbatim on [marginal] page 10, line 1 to [marginal] page 43 line 3 in this typewritten transcript.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: Respondents further offer to prove by said witness Adolph F. Meyer, that for a number of years before 1925, he was consulting engineer for the Keewatin Power Company and that he has been consulting engineer for said company from 1925 to the present time; that he is acquainted with the facts and circumstances leading up to and continuing through the negotiation and execution of the contract entered into between said Keewatin Power Company and the Govern-

ment of the Dominion of Canada, and that he knows the
50 desires and requirements of the interests and authorities operating and controlling the dams and projects at the outlets of said lake regarding the use and control of said Lake of the Woods reservoir, as such desires and requirements conflicted with the desires and requirements of the interests and authorities operating and controlling the projects in the Winnipeg River.

Mr. Lewis: Respondents further offer to prove by said witness Adolph F. Meyer, that the interests and authorities operating and controlling the same and projects at the outlets of said lake, within the province of Ontario, at all times favored and required and now favor and require a different outflow and type of storage and control of the waters of said lake from those favored and required by the interests and authorities operating and controlling the projects in the Winnipeg River, within the Province of Manitoba.

Mr. Lewis: Respondents further offer to prove by said witness that the difference between the outflow, and the type of storage and control favored and required by said Ontario interests and authorities, and those favored and required by said Manitoba interests and authorities, was substantial and fundamental, and was such as caused and would cause said Ontario interests and authorities to compete with said Manitoba interests and authorities for the right and power to develop and control said Lake of the Woods storage reservoir.

Mr. Harries: The Government objects to the foregoing testimony upon the following grounds. (1) It is too general and indefinite to be received in evidence; (2) The probabilities of competition are not a proper subject of expert testimony by this witness; (3) The testimony is speculative; (4) no foundation has been laid for its introduction; (5) it
51 is further objected to as immaterial; (6) The Government objects to testimony of a difference in interest between Ontario and Manitoba authorities as to outflow control, upon the ground that these differences would not put such authorities in competition for flowage rights; and objects to testimony of competition for the right to develop and control the Lake of the Woods reservoir on these grounds: (a) competition for the right to develop the reservoir would not put said authorities in competition for the lands on the American shore, but would go only to the Canadian governmental privilege of controlling the outlets; (b) there is no showing that such competition was reflected in market values on the south

shore; (c) as a matter of law, such competition could not be reflected in market values on the south shore because of the impracticability of developing and controlling the reservoir without the intervention of eminent domain.

Mr. Lewis: Respondents further offer to prove by the witness Adolph F. Meyer that prior to the signing of the treaty of 1925 and the negotiations leading up to said treaty the power capacities at the outlets of the Lake of the Woods and in the Winnipeg River deriving substantial benefits from the Lake of the Woods storage reservoir had already been developed to such an extent that the interests or authorities operating or controlling said power developments would, for the reasons stated in preceding offers of proof, have sought to acquire the flowage easements required for the Lake of the Woods reservoir if the treaty had not been entered into.

Mr. Harries: The Government objects to this testimony as a conclusion, without proper foundation, incompetent, irrelevant and immaterial.

The Government also objects to all of the proposed
52 testimony of Adolph F. Meyer, and to each item thereof upon each of the grounds stated on pages 613 to 620A inclusive of the record immediately after the offer to prove previously made by means of the witness Adolph F. Meyer," as shown on [marginal] page 36, line 1, to [marginal] page 43 line 3, of this typewritten transcript.

Respondents next offered in evidence respondents' Exhibit 35, the same being respondents' offer to prove certain facts as set forth in said exhibit by witness Clarence H. Nelson, electrical hydraulic engineer for the Minnesota State Tax Commission. Said Exhibit 35, the government's objection thereto and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

"CLARENCE H. NELSON.

11. Respondents offer to prove by the witness Clarence H. Nelson that he is a resident of the City of Minneapolis. That he was graduated from the University of Minnesota in 1925 with degree of electrical engineer. That since his graduation he has been employed for a year and a half with the Public Service Company of Northern Illinois, with offices at Chicago, and that since February, 1927, he has been electrical

and hydraulic engineer for the Minnesota State Tax Commission.

12. Respondents further offer to prove by said witness that he is acquainted with the custom and practice in the State of Minnesota in the taxation of flowage rights and easements.

13. Respondents further offer to prove by said witness that for a number of years last past the State of Minnesota and the various taxing authorities of said state and of the political subdivisions thereof in which water power of storage projects are located have taxed flowage rights and
53 easements as separate and distinct property.

Mr. Harries: The Government objects to the offer on the grounds stated in the statement of objections attached to the copy of the proposed testimony of Mr. Nelson, and I ask to have it marked as government's Exhibit 99.

13. The Government objects upon all of the grounds stated at the opening of court January 26, 1931 (record page 233); and upon the further grounds (1) that the mode of assessing taxes or determining elements of value for purposes of taxation is incompetent, irrelevant and immaterial; (2) that the proposed testimony contains conclusions of law for proof of which by this witness no proper foundation has been laid.

The Government also objects to all of the proposed testimony of Clarence H. Nelson and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer, as shown on [marginal] page 36, line 1, to [marginal] page 43, line 3 of this typewritten transcript.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Respondents next offered in evidence Respondents' Exhibit 42, the same being respondents' offer to prove certain facts as set forth in said exhibit by W. E. KING, a consulting engineer. Said Exhibit 42, the government's objection thereto and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

Mr. Lewis: Respondents next offer to prove by the witness W. E. King the facts set forth in Respondents' Exhibit

42, and state to the Court that if the witness W. E. King were permitted to testify that he would testify to the
54 facts set forth in said exhibit.

Mr. Harries: The Government objects to the offered testimony upon the grounds set forth in the statement of objections attached to a copy of the offer to prove by respondents, and I ask to have the document marked as General Government's Exhibit 100.

(Document marked General Government's Exhibit 100 for identification by the reporter.)

Mr. Lewis: 14. "Respondents offer to prove by the witness W. E. King, duly sworn and on the stand ready to testify, that he is a graduate of the University of Minnesota, 1905, with the degree of Civil Engineering; that he is a member of the American Society of Civil Engineers, the American Concrete Institute, the St. Paul Society of Engineers, and is a registered engineer licensed to practice said profession in the State of Minnesota. That said witness has been actively engaged in the engineering profession since the year 1905; that for two years he was employed by the American Bridge Company of Minneapolis, Minnesota, as an Engineer; for one year he served as engineer for the Minneapolis Steel and Machinery Company, and for one year as engineer in the bridge Department of the Great Northern Railway Company; that during all other times since the year 1905 he has been and now is a practicing and consulting engineer. That said witness has had a wide and varied experience in power projects involving the purchasing and valuing of flowage easements; that among such projects to which he has given study and with which he has been actively engaged are the following: The construction of two dams in the Des Moines River near Humboldt, Iowa, where his duties consisted in the erection of such dams and in the valuing of the flowage easements purchased for reservoir purposes on such projects;
55 that he supervised the construction of the dam at Rutland, Iowa, where his duties were similar to those described in the said projects at Humboldt, Iowa; that he was called in as consulting engineer to assist in determining the value of flowage and storage easements acquired by the Northern States Power Company on its project in the Mississippi River near St. Paul. That he has been consulted on numerous occasions with respect to valuing flowage and storage easements for the purpose of rate-making; that he was recently engaged in behalf of Morrison County, Minnesota, in the valuing of flowage and storage easements on the so-

called Blanchard Dam Project and Little Falls Dam project, which valuations were made to determine the value of said flowage and storage easement for the purpose of taxation.

Mr. Harries: 14. The Government objects to any statement of qualifications to determine the valuation of flowage rights for the purposes of taxation as being immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 15. Respondents further offer to prove by said witness that he knows that there is a custom and practice in the State of Minnesota and in other northwestern states with reference to the purchase and conveyance of flowage easements. That it is the custom and practice in the State of Minnesota and other northwestern states to purchase, sell, and transfer flowage easements as separate and distinct units of property, and that for many years flowage easements have been regarded and dealt with in the State of Minnesota as such separate units of private property. That flowage easements are commonly recorded in the offices of the Register of Deeds of the several counties of Minnesota in like manner as other deeds of conveyance.

56 Mr. Harries: 15. The Government objects to this testimony of the witness as a conclusion of law, and without proper foundation; upon the ground that the custom and practice stated is not a proper measure of damage in this proceeding; on the ground that custom and practice is immaterial; and on the ground that the custom and practice proved must be the custom and practice at the time when and the place where the condemnation is exercised.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 16. Respondents further offer to prove by said witness that he has been personally connected with the evaluation and assessment of flowage easements in the State of Minnesota, and that he has made a study of the practice of the taxing authorities in said state in assessing and taxing flowage easements. That he knows of his own knowledge that flowage easements are assessed and taxed as separate and distinct units of private property by the taxing authorities of various places in said state.

Mr. Harries: 16. To which the government objects on the ground that the practice of taxing authorities is irrelevant and immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 17. Respondents further offer to prove by said witness that there is a well established and generally recognized custom and practice among hydraulic engineers and owners and operators of projects involving flowage easements and reservoir, and among those charged with the responsibility of appraising the value of flowage easements. That he knows what this custom and practice is. That this custom and practice is that the value of each storage reservoir and of the flowage easements required therefor
57 is appraised and determined on the special facts and circumstances in connection therewith.

Mr. Harries: 17. To which the Government objects on the ground of objection to number 15.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 18. Respondents further offer to prove by said witness that there is no market for flowage easements in the State of Minnesota and other northwestern states as the term "market" is commonly understood. That there is no market value in said region for flowage easements as the term "Market value" is commonly understood. That from the nature of the projects for which flowage easements are required it is impossible for a market therefor to exist, because the value of each such project and of the flowage easements required therefor must be determined according to the special facts and conditions thereof.

Mr. Harries: 18. To which the Government objects on the ground that special facts and conditions are not the true measure of damage; and on the ground that the testimony of what constitutes a market or market value is a conclusion of law; as incompetent, irrelevant and immaterial, and without proper foundation, and upon each ground heretofore stated.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 19. Respondents further offer to prove by said witness that the method uniformly used in appraising and determining the value of any easement for flowage or storage purposes according to the well established custom and

practice which has been described by the witness and with which the witness is acquainted is to take into consideration the storage capacity of the reservoir in question, the location
58 of the reservoir with reference to the place of utilization of the water stored therein, the extent to which and the manner in which the water can be utilized, the time which will be required therefor, and the economic practicability of the development and operation of the necessary project works. The determination of the value of the reservoir as a whole and of each component part thereof, including the value of the several flowage easements required, then becomes a matter of expert intelligence and professional judgment, based upon experience.

Mr. Harries: 19. To which the Government objects upon each ground heretofore stated and upon the further ground that the witness leaves out of account the vital consideration of the practicability of uniting ownership of the properties necessary for the project and deals only with the economic practicability of the development. The government also objects to all of the proposed testimony of W. E. King and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Respondents next offered in evidence Respondents' Exhibit 43, the same being respondents' offer to prove certain facts as set forth in said exhibit by witness GARDNER S. WILLIAMS, a consulting engineer. Said Exhibit 43, the government's objections thereto, and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

Mr. Lewis: 20. Respondents offer to prove by the witness Gardner S. Williams as follows:

That he resides in Ann Arbor, Michigan, and is 64
59 years of age. That his present occupation is consulting engineer. That he has had 43 years engineering experience. That he is a member of the following engineering societies:

Member American Society of Civil Engineers.

Member American Society of Mechanical Engineers.

Member The Detroit Engineering Society, and others, and has been a Vice President of American Engineering Council for the past 7 years.

That he was educated in the public schools of Saginaw, Michigan, and at the University of Michigan, where he was graduated with degree of Bachelor of Science in Civil Engineering in 1889, and received advance degree of Civil Engineering in 1899. That he began work on local land surveys while in college and in the summer of 1887 was engaged on water works construction at Bismarck, North Dakota, and similarly in 1888 and 1889 at Greenville and Owosso, Michigan, respectively. That from 1889 to 1893 he worked for the Russel Wheel & Foundry Company of Detroit, a firm of manufacturing contractors in iron and steel, as draftsman and engineer, and from 1893 to 1898 was civil engineer to the Board of Water Commissioners of Detroit. That from 1898 to 1904, he was Professor of Experimental Hydraulics and Engineer in Charge of the Hydraulic Laboratory at Cornell University; and from 1904 to 1911 was Professor of Civil, Hydraulic and Sanitary Engineering at the University of Michigan, also carrying on a consulting practice from 1898. That he was appointed a member of the International Waterways Commission by President Roosevelt in 1903 and resigned therefrom in 1905. That since leaving the University of Michigan in 1911 he has been engaged in consulting work, mainly along water power and water supply and other hydraulic lines; and has been called to practice in 21 states as well as the Canadian Provinces of Quebec and Ontario, the major part of his work having been in Michigan, Illinois and Minnesota, in each of which he is registered to practice engineering. That among his important works in Michigan have been the design and construction of hydroelectric power plants for the Edison Sault Electric Company in the rapids at Sault Ste. Marie, Michigan, with which he was connected from 1905 to 1916; the design and construction of a series of five hydroelectric power plants with local storage on the Huron River in Michigan for the Detroit Edison Company, between 1906 and 1926. Also the design and construction of hydroelectric plants for the City of Sturgis, Michigan, on the St. Joseph River and for the Alpena Power Company on the Thunder Bay River in Michigan. That in Iowa he designed and supervised the construction of a dam across the Des Moines River at Des Moines, Iowa, for power and storage purposes. That in Illinois, his engagements have been mainly in connection with the constructions, hydraulic investigations and litigations of the Sanitary Dis-

trict of Chicago, including studies in the regulation of the international waters of the Great Lakes System. That in Minnesota in 1911-12 he was employed by the Corps of Engineers of the United States Army to design the substructure of the Power House at Lock & Dam No. 1 of the Mississippi River Improvement, which is located between Minneapolis and St. Paul, and which was constructed after the plans prepared by him, and in 1913 he was engaged as consulting engineer to design and supervise the construction of various storage dams for the Great Northern Power Company of Duluth, and continued in that relation until the property of the company was sold in 1923, during which time there were constructed the Island Lake Storage Dam, the Boulder Lake Storage Dam, and the Whiteface Reservoir Dam, and extensive studies were made of possible equalization of the flow of the St. Louis River. That from 1916 to 1918 he was
61 engaged in the reconstruction of the hydraulic power plants of the Watab Pulp & Paper Company, at Sartell, Minnesota, and in the water power and storage investigations in connection with that property. That he has been a witness in various litigations among which are:

The Drainage Canal case, State of Missouri vs. State of Illinois, etc., in the U. S. Supreme Court.

The Sanitary District Cases; U. S. vs. Sanitary District of Chicago, in the U. S. District Court for Northern Illinois.

The Chandler-Dunbar Water Power case in the U. S. District Court for Western Michigan; Milwaukee vs. Western Foundation Co., in the U. S. District Court for Eastern Wisconsin; Wm. Cramp & Sons vs. Wellman-Seaver Morgan Co., in the U. S. District Court for Northern Ohio; Neely vs. Ford Motor Co., in the U. S. District Court for Eastern Wisconsin; Wisconsin et al. vs. Illinois & Sanitary District, before the U. S. Supreme Court, with Justice Charles Evans Hughes as Master.

That he has also been a witness in the state courts of Michigan, Illinois, Minnesota, Iowa, New York, Wisconsin, and Virginia. That in cases involving valuations he was the principal witness for the company in City of Ithaca vs. Ithaca Water Works Company for condemnation in New York. That he was a leading witness for the defendants in U. S. vs. Chandler Dunbar Water Power Company, et al. That he was also a witness in Loranger vs. City of Flint, a water diversion and drainage case in Michigan, and in the City of Chicago vs. Sanitary District of Chicago, a sewer

right of way condemnation case in Illinois. Also in Marselles Water Power Co. vs. Northern Illinois Traction Co., a water power valuation case in Illinois, and in Land-
62 owners vs. Watab Pulp & Paper Co., a flood damage case in Minnesota. Also in City of Pontiac vs. Commercial Milling Co., a water power condemnation case in Michigan; in Bryant Paper Co. vs. Monarch Paper Co., a flood damage case in Michigan; In Rayburn Lumber Co. vs. Alpena Power Company, a flood damage case in Michigan; and in Hubbell vs. Van Tine, et al., a water storage and damage case in Michigan. That he was also a leading witness for the defendant in Warner Moore & Co. vs. Chesapeake and Ohio Ry. Co., a water supply damage case in Virginia, and has made several appraisals of property for sale or bonding purposes. That among the latter, for several years he made appraisals of the additions and betterments of the properties of the Great Northern Power Co. of Duluth, for bonding purposes, in which the betterments, etc. consisted of water power and storage lands and constructions, transmission lines and appurtenances, rights of way, power plants, etc. During the World War he was an Associate Member of the Naval Consulting Board and engaged on the survey for Industrial Preparedness of Michigan, in 1916, and was a Major in the Engineer Officers Reserve Corps, stationed at Camp Beauregard, La., on camp construction, and at Washington, in the constructing quartermaster's department, in 1917. That in the acquisition of lands for water power or reservoir purposes, in association with three other gentlemen, he acquired control of some 12,000 or 14,000 acres of water power lands in Michigan on the Tittabawassee and Tobacco Rivers comprising sites for five dams and power plants, making a reservoir development of the stream covering some 90 miles of river and tributaries designed to equalize about 75 per cent of the flow of the stream, which involved the acquisition of about 400 parcels without the exercise of powers of eminent domain or any government assistance, there be-
63 ing no water power condemnation in Michigan at that time, which was between 1907 and 1917. That the property so acquired has been since developed. That between 1906 and 1920 he had charge of the expenditure of nearly a million dollars for water power lands and rights on the Huron River in the State of Michigan for the Detroit Edison Company, the prices paid for the latter lands and rights ranging from $16.00 to $400.00 per acre. Those properties were to a large extent secured for reservoir purposes as each plant was developed with as much storage above it

as it was possible to get, and they consisted in part of flowage easement and in part of fee acquisitions.

Mr. Lewis: 21. Respondents further offer to prove by the witness Gardner S. Williams that he has studied and acquainted himself with the report known as Water Resources Statement No. 3 of the Dominion Water Power Branch, Department of the Interior of Canada, published in 1915, entitled "Winnipeg River Power and Storage Investigation," by J. T. Johnson, also with the documents known as Water Power Resources Paper of the Department of the Interior of Canada, Dominion Water Power and Reclamation Surveys, Nos. 31, 54 and 57, as well as with a very large amount of other literature and engineering and statistical data and information relating to the power resources and development of the Lake of the Woods and Winnipeg River. That he has personally visited and examined the Lake of the Woods and the Winnipeg River Power Projects, and that he knows the power capacities of the Lake of the Woods and the Winnipeg River and the extent of the development of such capacities up to the present time. That he has visited the City of Winnipeg and the villages of Kenora and Rainy River and intervening points in Canada, and the villages of Warroad, Baudette and intervening points in the
64 State of Minnesota. That he is familiar with the character of the lands involved in these condemnation proceedings.

Mr. Harries: 21. The Government objects to so much of the statement of qualifications as is based upon Water Power Resources Papers on the ground that the same are hearsay, and no opportunity is afforded to cross-examine their author J. T. Johnston or other authors thereof.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 22. Respondents further offer to prove by said witness that he has heard or has read the official reporter's transcript of all the testimony given by Adolph F. Meyer in this proceeding relating to the facts and conditions of the Lake of the Woods, of the watershed of said lake, of the storage reservoir of said lake, of the Winnipeg River, of the Power developments and other works in said lake and river, of the control that has been exercised and the use that has been made of the waters of said lake and

river, and particularly of the storage reservoir of said lake by means of said power developments and other works, also the testimony of said Adolph F. Meyer as to the facts and conditions of the resources and capacities of all of said waters for power and other purposes.

23. Respondents further offer to prove by said witness Gardner S. Williams that he has made a study of the advantage to be derived by the power projects at the outlets of the Lake of the Woods and in the Winnipeg River by the utilization of the storage possibilities of the Lake of the Woods in conformity with the provisions of the treaty of 1925.

24. Respondents further offer to prove by said witness that the utilization of the storage capacity of the Lake of the Woods pursuant to said treaty will result in an in-
65 crease of the continuous water horse power which can be developed by said water power projects of approximately 200,000 such horse power.

Mr. Harries: 22-23-24. The Government objects to the foregoing testimony upon each of the grounds stated immediately following the last of the offers of proof of respondents; and further objects to such testimony on the ground that the same is without proper foundation; and on the ground that the evidence is immaterial because there is no evidence that existing power plants can utilize the continuous flow from increased storage and so develop 200,000 additional horse power; nor that there is a market for the same.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 25. Respondents further offer to prove by said witness that the significance and advantage of obtaining a constant stream flow and continuous horse power which would be obtained through the utilization of the storage capacity of said lake is that since there is no other available source of power in the area furnishing a market for the output of the aforesaid development sufficient to supply the required power at times when the output of said developments under natural conditions would be low, it is important to obtain a constant stream flow by utilizing the Lake of the Woods storage, thus making it possible to deliver a substantially uniform quantity of power from day to day and month to month, limiting the variation in the quantity of available power to a minimum.

Mr. Harries: 25. The Government objects to the foregoing testimony on the ground that the Court will take judicial

notice of its falsity by reason of the available sources of power on the English and Nelson Rivers sufficient to
66 supply the same market without any resort to Lake of the Woods storage; and an additional source in the Saskatchewan River, within 150 miles of Winnipeg capable of developing 325,000 horse power.

The Court: Objection sustained.

Mr. Lewis: Exception.

Mr. Lewis: 26. Respondents further offer to prove by said witness that he has informed himself concerning the demand and market for power in the territory supplied ffom the aforesaid projects, and that he has found that the power requirements of said area are now or will be in the very near future sufficient to consume the entire output of said power projects with the full utilization of the storage capacity of the Lake of the Woods as contemplated by the treaty of 1925.

Mr. Harries: 26. The Government objects to the foregoing testimony on the ground that it is speculative and conjectural and without any foundation in the way of proof of what the market demand is or will be.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 27. Respondents further offer to prove by said witness that he has studied the physical and international conditions and aspects of the Lake of the Woods storage reservoir with respect to the practicability of acquiring the flowage easements necessary to the development and utilization of said reservoir, and that he has formed an opinion with reference thereto, based upon his said study and upon his knowledge and experience gained as stated in the foregoing testimony and offers of proof. That it is his opinion and firm belief that it would be entirely practicable for the interests or authorities operating or control-
67 ling the power projects to acquire and unify the flowage easements necessary to the development and utilization of the Lake of the Woods storage reservoir as contemplated by the treaty of 1925.

Mr. Harries: 27. The Government objects to the foregoing testimony on the ground that it constitutes a conclusion of law on the part of the witness, is incompetent, and without foundation; that witness has not qualified as an expert in in-

ternational diplomacy and has testified to no facts which would make him legally competent to give the foregoing opinion.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 28. Respondents further offer to prove by said witness that it is his opinion and firm belief that if it were not for the treaty of 1925 and governmental action taken thereunder said interests or authorities would unquestionably have acquired the flowage easements necessary to the development and utilization of said storage reservoir, and that it would have been entirely practicable for them so to do.

Mr. Harries: 28. The Government objects to this testimony on the ground that it is without any foundation; is speculative and conjectural; and the opinion of the witness is immaterial, since as a matter of law the action of the interests described would not have affected the market value of the properties involved. The testimony is further objected to as a conclusion for which no foundation has been laid; and as being completely refuted by the fact that such authorities referred to did not even seek to acquire such easements.

The Court: The objection is sustained.

Mr. Lewis: Exception.

68 Mr. Lewis: 29. Respondents further offer to prove by said witness that the reason for the opinion expressed by him in the foregoing offer of proof is that said storage reservoir is of such substantial advantage and benefit to the interests or authorities controlling or operating power projects at the outlets of said lake and in the Winnipeg River that it would be to their best interests as a matter of sound business policy to acquire said flowage easements.

Mr. Harries: 29. The Government objects to this testimony as speculative and conjectural and without any foundation by proof of knowledge of the costs of plant, site, operation, personnel, taxes, financing, marketability and possible earnings.

The Court: Objection sustained.

Mr. Lewis: Exception.

Mr. Lewis: 30. Respondents further offer to prove by said witness that there is no general market and no general

market value for flowage easements as those terms are customarily used and understood. That the fair value or the fair market value, as it is sometimes called, for flowage easements is, as a matter of common practice in connection with projects involving such easements, arrived at on the basis of the particular facts and circumstances affecting each individual case.

Mr. Harries: 30. The Government objects to the foregoing testimony except insofar as it corroborates the Government's testimony that market values have not been affected by the storage possibilities of the lake, the grounds of the objection are (1) that the statement that there is "no general market" is a conclusion of law, has no proper foundation and is incompetent; (2) that the absence of an "easement market" is immaterial in condemnation proceedings
69 where the issue is the extent of damage to the entire tract on which the easement is imposed; (3) that a common practice cannot overcome the well defined legal measure of market value as the difference in value of the whole property affected, before and after the taking.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 31. Respondents further offer to prove by said witness that there is an established custom and practice in connection with such projects whereby the fair value, or the so-called fair market value, of flowage easements is arrived at. That he knows what said custom and practice is, and that it is as set forth in the next preceding offer of proof.

Mr. Harries: 31. The Government objects to the admission of this testimony for the reason that it frankly admits that "fair value" is not the same as "market value"; and that all testimony of this witness as to values is therefore wholly incompetent.

The Court: Objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 32. Respondents further offer to prove by said witness that in his opinion, based upon his experience and knowledge, the fair value or so-called fair market value of the flowage easements necessary to be acquired for the utilization of the Lake of the Wood storage reservoir as contemplated by the treaty of 1925 would be arrived at, in ac-

cordance with said custom and practice, if said flowage easements were sought to be acquired by the interests or authorities operating or controlling the power projects, through the usual methods of negotiation and bargaining between the willing seller and a willing buyer, both fully informed
70 and under no compulsion to buy or sell. That the fair value or so called fair market value so arrived at would be the result of the exercise of the best judgment on either side, and would represent a value somewhere between the value of the lands to their owners and the value of the easements to the interests or authorities seeking to acquire them. That said fair value or so called fair market value would not be based upon nor determined by the necessities of the interests seeking to acquire them nor upon the profits or benefits which such interests might derive therefrom, nor would it be based upon the use which the owners of said lands might at the time be able to make thereof, but that it would be determined and arrived at in the manner above described.

Mr. Harries: 33. The Government objects to this testimony as a conclusion of law; as being without proper foundation; that the method named refers to an entire reservoir collectively, and not to individual parts thereof and has no relation to taking easement by condemnation; and upon the ground that it is immaterial since the impossibility of unifying ownership of the necessary rights on the lake shore preclude the allowance of any added value by reason of storage possibilities, as a matter of law.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 33. Respondents further offer to prove by said witness that from his said knowledge and experience and particularly from his acquaintance with the facts and circumstances affecting said flowage easements and the development of said storage reservoir, he has formed an opinion as to the fair value or so called fair market value of the three flowage easements involved in these proceedings.

71 Mr. Harries: To which the government objects as immaterial.

The Court: The objection is sustained

Mr. Lewis: Exception.

Mr. Lewis: 34. Respondents further offer to prove by said witness that the fair value or so called fair market value

of the flowage easements upon the respective lands of the respondents in the present proceeding is as follows:

On the lands of Elias Olson, $10,800;

On the lands of Harry Brewster, $13,300;

On the lands of Randor G. Karlson $9,400.

Mr. Harries: 34. The Government objects to the foregoing testimony upon the grounds that (1) "so called fair market value of the flowage easements" is not a proper measure of value; (2) that the value of an easement is not a proper measure of damage in condemnation proceedings but the difference in value of the entire tract must be considered; (3) that no proper foundation has been laid; (4) that the testimony is incompetent; (5) that upon each ground hereinafter stated as an objection to each item in respondents offer of proof and set forth in full at pages following Meyer's testimony.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 35. Respondents further offer to prove by said witness that he has considered the fair values or so called fair market values of said flowage easements as set forth in the foregoing offers of proof, together with the corresponding fair value or so called fair market values of all the other flowage easements necessary to the development and utilization of said reservoir, as compared with the results
72 which may be derived by the purchasers from the acquisition and utilization of said easements, and also with the use or uses to which the owners of said lands might devote the same for other than flowage purposes.

Mr. Harries: 35. The Government objects to this testimony upon the ground that the witness has not shown himself qualified to appraise uses of the lands for purposes other than power.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 36. Respondents further offer to prove by said witness that he has made the comparison mentioned in the preceding offer of proof for the purpose of checking the soundness of his opinion as to the fair value or so called fair market value of said easements, and for the purpose of check-

ing the soundness of his opinion that the interests or authorities owning or controlling the power projects would acquire and utilize said flowage easements, if the United States had not undertaken by the treaty to acquire the same.

Mr. Harries: 36. To which the government objects upon the ground that the witness is lifting himself by his bootstraps and checking his opinion by his comparison and his comparison by his opinion.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 37. Respondents further offer to prove by said witness that as a result of his checking and comparisons made as set forth in the foregoing offers of proof, based upon his knowledge and experience, he has determined that the advantage and benefit which will be derived by the interests or authorities operating and controlling said power projects on account of the utilization of said flowage easements and said reservoir will exceed in value by more than two
73 fold the entire amount which said flowage easements required for said reservoir would cost, based upon fair values or so called fair market values arrived at in the manner heretofore described by said witness.

Mr. Harries: 37. To which the Government objects upon the ground that it assumes the cost of acquiring flowage easements.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 38. Respondents further offer to prove by said witness that the interests or authorities utilizing said flowage easements and said reservoir would reasonably be able to realize an additional annual profit or benefit as a result of such utilization exceeding $1,200,000, after allowing interest at the annual rate of eight per cent on the investments required for the acquisition of said flowage easements and reservoir on the basis of the values arrived at as heretofore described.

Mr. Harries: 38. The Government objects to this testimony upon the ground that no foundation has been laid; and that the testimony is speculative and conjectural and based upon facts not in evidence; that it assumes without any proof the cost of developing power, the effect of rate-fixing, operation and capital costs, and is incompetent; it assumes an an-

nual rate of earnings without foundation by proof of market possibilities; does not include the time for which such earnings may be expected to continue; and is irrelevant because as a matter of law no undertaker could make the development because of the impossibility of unifying the necessary shore rights. The government also objects to all of the proposed testimony of Gardner S. Williams and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

74

The Court: The objection is sustained.

Mr. Lewis: Exception."

That thereafter respondents offered in evidence Respondents' Exhibit 44, the same being respondents offer to prove certain facts as set forth in said exhibit by witness LINUS LANDBY. Said Exhibit 44, the government's objection thereto and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

"Mr. Lewis: Respondents offer to prove by the witness Linus Landby the facts set forth in evidence in respondents' Exhibit 44, and state to the court that if the witness Linus Landby were permitted to testify that he would testify to the facts set forth in said exhibit.

Mr. Harries: The government objects to the offered testimony upon the grounds set forth in the typewritten sheet attached to copy of the offered testimony of Mr. Landby, and I undersand that the reporter will mark as exhibits all of the objections presented by the government, so that they may appear following the testimony offered on the part of the respondents.

And I ask to have this marked as a Government's Exhibit.

(Document marked Government's Exhibit 102 for identification by the reporter.)

Mr. Lewis: 39. Respondents offer to prove by the witness Linus Landby, duly sworn and on the stand ready to testify, that he has been a resident of Roseau County, Minnesota, for more than twenty years. That he is a farmer. That he is a son of A. M. Landby, who is a former state senator from Roseau County, and who was one of the residents of said county who took part in attempting to establish the rights of the owners of property flooded by

75

the waters of the Lake of the Woods to compensation and damages for the use of said property for flowage and storage purposes. That during the year 1924 said Linus Landby purchased a tract of 120 acres, practically all of which is below contour 1064 on the shore of said lake. That said tract does not adjoin his farm upon which he resides, but is a considerable distance therefrom. That he purchased said tract solely because it was valuable and was reputed to be valuable for flowage and storage purposes. That he paid a larger sum for said tract than he otherwise would have paid on account of the fact that it was valuable and was reputed to be valuable for flowage and storage purposes. That he would not have purchased said tract at all except for such value and reputed value.

Mr. Harries: 39. To which the government objects upon the ground that the self-deception of the witness, and his ignorance of the law which had already conferred upon the United States a right to overflow his lands in aid of navigation to an unknown height, and his ignorance of other obstacles which rendered it impracticable as a matter of law to unify the ownership required for a reservoir, render it immaterial why he bought or what he paid more than he would have paid had he actually known the facts of which he was aware constructively, and in legal effect. The government also objects to all of the proposed testimony of Linus Landby and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The government's objection is sustained.

Mr. Lewis: Exception.

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76 That thereafter respondents offered in evidence Respondent's Exhibit 45, the same being respondents' offer to prove certain facts as set forth in said exhibit by witness THEODORE F. SPREITER. Said Exhibit 45, the government's objection thereto and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

"Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 45. (Document marked respondents' Exhibit 45 for identification by the reporter)

Mr. Lewis: Respondents now offer to prove by the witness Theo. F. Spreiter, the facts set forth for evidence in respondents' Exhibit 45, and I will state to the Court that if

such witness were permitted to testify that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The government objects to such testimony upon the grounds as stated in the sheet attached to the copy of the proposed testimony of Mr. Spreiter, and ask to have it marked as government's Exhibit 103.

(Document marked General Government's Exhibit 103 for identification by the reporter.)

Mr. Lewis: 40. Respondents offer to prove by the witness Theodore F. Spreiter, duly sworn and on the stand ready to testify, that he is a resident of the village of New Port, Washington County, Minnesota, and is president of the Farmers Terminal State Bank of said village. That from 1912 to 1918 he was a resident of the village of Warroad, Roseau County, Minnesota, and was the organizer and cashier of the Security State Bank of said village. That through his connection with said bank he became acquainted with certain sales and transfers of lands along Lake of the Woods below contour 1064 in said county during said period.

That the number of said sales was small. That in
77 each instance with which he was familiar the sale and transfer was made as a forced sale and because the grantor was in financial distress.

Mr. Harries: 40. The Government objects to this testimony upon the following grounds: (a) neither the number of sales nor the fact of sales below contour 1064 is material because the lands affected lie above as well as below the level; (b) financial distress is a mental state as to which the witness is not qualified to testify; (c) witness does not profess to be familiar with all sales; (d) the characterization of sales as "forced" is a conclusion of law and/or fact and oral testimony is not the best evidence thereof.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 41. Respondents further offer to prove by said witness that he knows of two or three such forced sales wherein the purchaser purchased the land in question solely because of its value and reputed value for flowage and storage purposes, and that he knows of his own knowledge that the purchaser paid a higher price for the land than he would have paid except for the fact that the land was valuable and was reputed to be valuable for flowage and storage purposes.

Mr. Harries: 41. The government objects to this testimony on the ground that motive of purchase is immaterial; and no foundation has been laid for proof thereof; on the ground that reputed values are immaterial if in fact such reputation was false because the required land could not be unified save by the joint action of National Sovereignties and if the hope engendered by such false repute was as a matter of law so speculative and conjectural that it could not influence market values. That such false repute ignored existing laws conferring a right of flowage on the United States in aid of navigation to an unknown water level and
78 hence the hope of unification could not as a matter of law enhance market values. The Government also objects to all of the proposed testimony of Theodore F. Spreiter and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer, as shown on [marginal] page 36 line 1 to [marginal] page 43 line 3 of this typewritten transcript.

The Court: The government's objection will be sustained.

Mr. Lewis: Exception."

That thereafter respondents offered in evidence Respondents Exhibit 46, the same being respondents offer to prove certain facts as set forth in said exhibit by witness BARNEY ARNESON. Said Exhibit 46, the government's objection thereto and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

Mr. Lewis: I now ask to have this document marked as Respondents' Exhibit 46.

(Document marked Respondent's Exhibit 46 for identification by the reporter)

"Mr. Lewis: The respondents next offer to prove by the witness Barney Arneson the facts recited and set forth in Respondents' Exhibit 46, and state to the court that if said witness Barney Arneson were permitted to testify that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to such testimony upon the grounds as stated upon the two typewritten sheets attached to the copy of the proposed testimony of Barney Arneson, and I ask to have it marked as General Government's Exhibit 104.

(Document marked General Government's Exhibit 104 for identification by the reporter.)

"Mr. Lewis: 42. Respondents offer to prove by the witness Barney Arneson, now on the stand, that he has
79 been a resident of Warroad, Minnesota, since 1897. That he lives on a farm in the vicinity of the village of Warroad and that he is also engaged in the fishing industry. That he is a married man with a family and that he owns several pieces of property both within and without the village of Warroad.

43. That he remembers the completion of the Norman Dam and the putting in of the stop logs in said dam during the year 1898. That he filed on a homestead in Roseau County not far from the village of Warroad in 1898, and that during the year 1899 his land, as well as other low-lying lands adjacent to the source of the Lake of the Woods, was flooded by the waters of said lake due to the presence and operation of the Norman Dam at one of the outlets of said lake.

44. That during the year 1899 and 1900 the property owners along the shores of the Lake of the Woods had made inquiry and investigation to ascertain the cause of said flooding and at that time learned that said lake was being used as a storage reservoir for the development of water power.

45. That on discovering that the waters of the Lake of the Woods were used for power purposes and that said lake was being used as a storage reservoir, and that the adjacent lands were being flooded and were used by the power companies to form said storage reservoir, it became a matter of common report, reputation, rumor and conversation among said property owners and among the residents in said area generally that the lands so flooded were of great value for storage purposes and bore such reputation, and that the said lands so flooded were more valuable than were the higher lands which were not flooded and that their highest value was for flowage purposes. That said lands so flooded were used by the power companies owning and operating the said Norman Dam
80 and shortly thereafter were used by other companies owning and operating dams and power plants at the other outlets of said lake and in the Winnipeg River as and for a storage reservoir to equalize the flow of said water for power purposes.

Mr. Harries: 42, 43, 44, 45. The Government objects to the foregoing testimony upon the grounds that rumors, etc. of value for flowage purposes and common report that such

values were highest are immaterial, since such rumor and report could not, as a matter of law, be reflected in market values because of the impracticability of unifying ownership of the flowage rights.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 46. That during the years 1903, 1904 and 1905 the said property owners organized themselves into an association for the purpose of controlling the use value of their said properties which were so being flooded and used by said power companies, and for the purpose of obtaining relief from said continued trespass on their property by bringing about either a discontinuance of said trespass or the payment of just compensation therefor. That said association employed counsel to advise and to represent them, and that among the counsel so employed were Mr. William Taylor, The Honorable Halvor Steenerson, Member of Congress from the Ninth Minnesota Congressional District, Honorable Charles Loring, now a member of the Supreme Court of the State of Minnesota, the Honorable G. A. Youngquist, now Assistant United States Attorney General, C. E. Berkman, Esq., an attorney at law, Chisholm, Minnesota, Messrs. Middleton & Middleton, Attorneys at Law of Baudette, Minnesota, Honorable Albert Chilgren, Attorney at Law of Baudette, Minnesota, Mr. Bert Hanson, The Honorable
81 Julius J. Olson, now a judge of the District Court of the State of Minnesota for the Fourteenth Judicial District, and the attorneys of record in these proceedings.

Mr. Harries: 46. Objected to as immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 47. That the said property owners at all times since 1903 or 1904 have been associated together and organized and have been represented by legal counsel. That during all of said period from 1899 down to the present time, it has been a matter of common report, rumor, reputation and conversation among the said property owners and other residents of said area that the said lands so flooded possessed a high value for flowage purposes and that they were more valuable for flowage purposes than for any other purpose. That during substantially all of said period it was a matter of common report. rumor, reputation and conversation among said

property owners and other residents of said area that the use of said lands for flowage and storage purposes as so made by said power companies entitled the owners of said land to recover substantial compensation and damages on account of said use.

Mr. Harries: 47. To this testimony the Government objects on the same ground as stated in its objection to paragraphs 42, 43, 44 and 45.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: We further offer to prove by the said witness Barney Arneson that for a long period of years he has served as official assessor of large areas bordering on the shores of the Lake of the Woods and that accordingly he became intimately acquainted with said properties so flooded and the owners thereof; that he has during all of said times
82 made a close observation and study of transfers of property within the said area so flooded and that he has never known or heard of a flowage easement being either bought or sold along the shores of the Lake of the Woods.

Mr. Harries: 48. To which the Government objects upon the ground that such testimony is immaterial and does not go to the proper measure either of damages or market value, inasmuch as the award in condemnation must be based on the diminution of value of the entire tract affected and not upon the market price of a flowage easement.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 49. Respondents further offer to prove by said witness Arneson that the sale and transfer of lands within said flooded area had been extremely infrequent and that he has conducted an investigation and has ascertained the facts and circumstances surrounding a large number of said transfers and that in practically every instance of such transfer the said transfer was made on account of financial distress or as a forced sale.

Mr. Harries: 49. Objected to as contradictory; a "large number" and "extreme infrequency" cannot co-exist; objected to as not the best evidence of "forced sales", as incompetent in alleging the state of mind described as "financial distress";—it may have been only embarrassment.

The Court: Objection sustained.

Mr. Lewis: Exception.

Mr. Lewis: 50. Respondents further offer to prove by said witness Arneson that in many of the sales and transfers referred to in the foregoing paragraph and offer of proof, the witness knows that said sales and transfers were made to persons who acquired said property on account of
83 their value for flowage and storage purposes; that in each instance the person so purchasing and acquiring said lands which had been so flooded paid a larger price therefor on account of their value and reputed value for flowage purposes, and that except for the fact that said lands were reputed to be valuable for flowage purposes the persons so acquiring the same would not have purchased them at all.

Mr. Harries: 50. To which the Government objects upon the following grounds: It is immaterial that the buyers referred to acted under a mistake of law as to the practical possibility that adaptability for flowage could or did affect the market value of the property transferred.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 51. Respondents further offer to prove by said witness Arneson that in the year 1920 he owned and resided on his own homestead, upon which he had filed in the year 1898 or thereabouts, and on which he had resided ever since, which were riparian lands bordering on said lake, and that during said year he purchased a tract of 160 acres practically all of which was below contour 1064, and that he purchased the said tract because of its value and reputed value for flowage and storage purposes, that he paid a larger price therefor than he would have paid except for said flowage and storage value and that he would not have purchased said tract at all except for the fact that he considered it valuable for flowage and storage purposes.

Mr. Harries: 51. To which the Government objects on the ground last above stated.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 52. Respondents further offer to prove
84 by said witness Arneson that the owner of said tract of land which he purchased, as mentioned in the fore-

going paragraph and offer to prove, was in financial distress at and prior to said sale and transfer; that a mortgage was due against said lands and that the sale and transfer was made on account of said owner's inability to meet the payments due on said mortgage.

Mr. Harries: 52. The Government objects to this as not being the best evidence; as immaterial; and on the ground that financial distress is not a gauge of market value, and as belying the claim in paragraph 51 that witness paid more than he otherwise would.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 53. Respondents further offer to prove by said witness Arneson that during the time when the investigations and hearings were being conducted by the International Joint Commission at Warroad and elsewhere with reference to Lake of the Woods prior to 1917, he attended a number of said hearings and testified as a witness thereat; that on numerous occasions he heard members and advisers of said International Joint Commission state in public meeting attended by a large number of property owners and residents of said area that said lands so flooded were more valuable for flowage and storage purposes than for any other purpose and that when the power resources of said Lake of the Woods basin were fully developed the flowage and storage rights of said lands so flooded would possess a value beyond the fondest dream of their owners; that said witness Arneson, as well as a large number of other property owners, stated to said International Joint Commission that he and they would not sell their said lands so flooded for any price representing their value for agricultural purposes.

Mr. Harries: 53. Objected to on the ground that "fondest dreams" are not a measure of market value, and statements to the International Joint Commission are immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 54. Respondents further offer to prove by said witness Arneson that following the publication and circulation of the final report of said International Joint Com-

mission in the year 1917, it was a matter of common report, rumor, reputation and conversation among the people generally residing in said area and among said property owners that said International Joint Commission had found and reported that the said lands so flooded were more valuable for flowage and storage purposes than for any other use or purpose.

Mr. Harries: 54. Objected to on the ground that rumor is not evidence, and the stated findings of the International Joint Commission are not the best evidence, and are immaterial; and its findings of a higher "use value" for storage is not a measure of market value. The Government also objects to all of the proposed testimony of Barney Arneson and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer, [marginal] page 36, line 1 to [marginal] page 43, line 3 of this typewritten transcript.

The Court: The objection will be sustained.

Mr. Lewis: Exception.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 47.

86 That thereafter respondents offered in evidence Respondents' Exhibit 47, the same being respondents' offer to prove certain facts as set forth in said exhibit by witness H. M. HENEMAN, said Exhibit 47, the government's objection thereto and the court's ruling thereon are as follows, exceptions being duly noted by and on behalf of respondents to each adverse ruling of the court;

"Mr. Lewis: I ask to have this exhibit marked as Respondents' Exhibit 46.

(Document marked Respondents' Exhibit 47 for identification by the reporter)

"Mr. Lewis: Respondents offer to prove by the witness H. M. Heneman, the facts set forth for evidence in Respondents' Exhibit 47, and state to the court that if said witness were permitted to testify, that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to the testimony of Mr. H. M. Heneman on the grounds as stated in the two typewritten sheets attached to the copy of his proposed tes-

timony. And may the record show, your Honor, that the objections on the part of the Government go to each specific item of proof offered by the respondents, as stated in the typewritten statements of objection.

And I ask to have the document marked as Government's Exhibit 105. (Document marked Government's Exhibit 105 for identification by the reporter.)

Mr. Lewis: 55. Respondents offer to prove by the witness H. M. Heneman, duly sworn and on the stand ready to testify, that he is a resident of the village of Warroad, Roseau County, Minnesota, and is cashier of the Security State Bank of said village, and has been such for 13 years last past. That during his entire period of residence in said village he has been familiar with the common report,
87 reputation and conversation among the people of said village and vicinity concerning the lands below contour 1064 on the shores of the Lake of the Woods which have been and are flooded and used for flowage and storage purposes in connection with the formation and maintenance of the Lake of the Woods storage reservoir. That for a number of years he has been secretary and treasurer of the Cloverleaf Federal Farm Loan Association. That in connection with his duties as cashier of said bank and as secretary of said association, he became and was during the entire period of his said residence in said village familiar with a very large proportion of the sales and transfers of property in the vicinity of Lake of the Woods in said Roseau County during said time.

Mr. Harries: 55. The Government objects to the reception of the proposed proof on the ground that it assumes a common report, reputation and conversation without proof thereof; that such report, reputation and conversation are immaterial, irrelevant and incompetent; that these condemnation proceedings are not limited to lands below contour 1064.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 56. Respondents further offer to prove by said witness that only a very small number of sales and transfers of land below contour 1064 have been made in Roseau County during the period of his said residence in said county. That he personally is acquainted with the facts and circumstances connected with a very large proportion of such transfers. That he knows of his own knowledge

that in the large majority of cases such sales and transfers as have been made on lands below contour 1064 were
88 made for the reason that the grantors were in financial distress and that such sales were made under such circumstances as to make them forced sales.

Mr. Harries: 56. The Government objects to this testimony on the ground that the number of sales of lands below contour 1064 is immaterial; that the financial distress of the grantors of such lands or any other lands is immaterial; that testimony by this witness as to the state of mind of the grantors is incompetent, and no foundation has been laid for proof thereof; that the characterization of sales as forced sales is a conclusion for which no foundation has been laid, and is not the best evidence.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 57. Respondents further offer to prove by said witness that he has never known or heard of a flowage easement being either bought or sold in Roseau County. That he is familiar to some extent with the transfers of land in the vicinity of Lake of the Woods in Lake of the Woods County, and that he has never known or heard of a flowage easement being either bought or sold in said county.

Mr. Harries: 57. The Government objects to this testimony as being immaterial and as not going to the proper measure of damage in this condemnation proceeding; and on the ground that the testimony has no tendency to prove that no such sales have been made; and upon the grounds stated by the Government at pages 233 to 242 of the record, [marginal] page 36, line 1 to [marginal] page 43, line 3 of this typewritten transcript.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 58. Respondents further offer to prove by said witness that in a number of cases of the sale and
89 transfer of tracts of land in Roseau County including lands below contour 1064, he directly assisted and counseled the parties in connection with the transaction, and has personal knowledge of all the details thereof. That in connection with said sales and transfers including lands below contour 1064 the use and value of such lands for flowage and storage purposes constituted a material consideration affecting such sales and transfers. That such use and value

for flowage and storage purposes caused the purchasers in said transactions to pay a higher price for said lands than they otherwise would have paid except for such use and value. That the value and reputed value of said lands below contour 1064 for flowage and storage purposes was a subject of negotiation in the consummation of said sales and transfers.

Mr. Harries: 58. The Government objects to this testimony as being too indefinite to be considered; as being hearsay and a conclusion as to the causes of prices paid; on the ground that the use of the lands in Roseau County constituting a part only of the lands required for a reservoir; and leaving out of account lands in Lake of the Woods County, and Canada, cannot furnish any measure of the value of any separate tract or group of tracts less than the whole number required.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 59. Respondents further offer to prove by said witness that only a very small number of sales and transfers of lands below contour 1064 have been made in Roseau County during the period of his residence. That he is personally acquainted with a large percentage of such sales and transfers, and that by far the larger portion of said sales and transfers with which he is familiar were
90 made for the reason that the grantors therein were in financial distress, and that said sales were in fact forced sales. That these sales and transfers referred to in the consummation of which he participated were likewise forced sales, and were made for the reason that the grantors therein were in financial distress.

Mr. Harries: 59. The Government objects to this testimony on the ground that the distress of the grantors is immaterial and no foundation has been laid for proof of the mental state of the grantors; that the description of sales as "forced" is a conclusion and not the best evidence.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 60. Respondents further offer to prove by said witness that during the period of his residence in Roseau County he was familiar with a large proportion of the sales and transfers of real estate in the vicinity of Lake

of the Woods in said county, and that he never knew or heard of a flowage easement being bought or sold.

Mr. Harries: 60. The Government objects to this testimony as immaterial, as not going to the true measure of damage, which must be based upon the effect of the taking upon the entire tract and must not be limited solely to the land within the physical boundaries of the space that is overflowed; for the easement carries with it all incidental appurtenances and involves all consequential damage. For example, if the easement cut off a road leading to the land on which the easement was imposed, or submerged the foreshore of a cliff so that boats could no longer land on the property, these facts must be regarded in appraising the damage. If it be said that the road and boat landing are not involved in the highest use to which the land is
91 adapted, respondent is thrown back on the basic claim that availability could not, as a matter of law, affect market prices because of the practical impossibility of uniting ownership of all lands or even of all easements except by the intervention of eminent domain. The Government also objects to all of the proposed testimony of H. M. Heneman as to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer. [marginal] page 36, line 1, to [marginal] page 43, line 3 of this typewritten transcript.

The Court: Yes, the record may so show, and the objection will be sustained.

Mr. Lewis: Exception."

That thereafter respondents offered in evidence Respondents' Exhibit 48, the same being respondents' offer to prove certain facts as set forth in said exhibit by witness HALVOR ROBBERSTAD, said Exhibit 48, the government's objection thereto, the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

"Mr. Lewis: I will ask to have this marked as respondents' Exhibit 48.

(Document marked respondents' Exhibit 48 for identification by the reporter.)

Mr. Lewis: Respondents offer to prove by the witness Halvor Robberstad the facts set forth in Respondents' Ex-

hibit 48, and state to the court that if Mr. Robberstad were permitted to testify that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to such testimony upon the grounds set forth in its written statement of
92 objections attached to the proposed testimony of Halvor Robberstad, and we ask to have this marked as Government's Exhibit 106.

(Document marked Government's Exhibit 106 for identification by the reporter.)

Mr. Lewis: 61. Respondents offer to prove by the witness Halvor Robberstad, duly sworn and on the stand ready to testify, that he is a resident of the village of Warroad, Roseau County, Minnesota. That for more than two years he has been U. S. Postmaster in said village and that for a number of years he resided in the village of Roosevelt in said County, and that for a number of years he was the president of the village council of said village. That after transferring his residence from Roosevelt to Warroad he was for a number of years president of the village council of Warroad. That he has lived in said county of Roseau during the past twenty-five years.

62. Respondents further offer to prove by said witness that during said entire period of twenty-five years he has been familiar with the facts that certain lands in the vicinity of Lake of the Woods were flooded and used for flowage and storage purposes in connection with the formation of a storage reservoir in said lake in the development of water power. That is a matter of common report, reputation, and conversation among the people of said Roseau County generally that said lands so flooded were very valuable on account of their use for flowage and storage purposes, and the said lands were more valuable for said purposes than for any other purpose.

Mr. Harries: 61-62. To all of which the government objects as immaterial, inasmuch as value for storage could not as a matter of law be reflected in market values because of the impracticability of realizing the values alleged.

93 The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 63. Respondents further offer to prove by said witness that in 1917 he purchased an eighty acre tract of land all of which is below contour 1064 on the shore of said

lake. That said tract was completely flooded during the preceding year, 1916, and that considerable portions of the same were flooded at the time he purchased it in 1917. That he purchased said tract solely on account of its value and reputed value for flowage and storage purposes. That he paid a larger price for said land than he otherwise would have paid because of its availability and use for such flowage and storage purposes. That in fact he would not have purchased said land at all except for the fact that it was so available and was so used.

64. Respondents further offer to prove by said witness that his grantor of said tract at the time of said sale and transfer was in financial distress and that said transfer was the result of a forced sale.

Mr. Harries: 63-64. The Government objects to the evidence in the two foregoing paragraphs on the ground that it is incompetent, without proper foundation, purports to describe a state of mind, is not the best evidence of a forced sale, is immaterial and irrelevant to the issue of damages because as a matter of law, of which witness was constructively aware, the value for storage purposes could not affect the market value of the land.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 65. Respondents further offer to prove by said witness that for a number of years between 1919 and 1929 he served as a member of a committee of the
94 Commercial Club of the village of Warroad, which committee was charged with the responsibility of protecting the rights and interests of the Village of Warroad in connection with the artificial raising of the waters of said Lake of the Woods.

Mr. Harries: 65. Objected to as immaterial.

The government also objects to all of the proposed testimony of Halvor Robberstad and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer, [marginal] page 36, line 1 to [marginal] page 43, line 3 of this typewritten transcript.

The Court: The objection is sustained.

Mr. Lewis: Exception."

That thereafter respondents offered in evidence Respondents' Exhibit 49, the same being respondents' offer to prove certain facts as set forth in said exhibit by witness JOHN A. KENNEDY, said Exhibit 49, the government's objection thereto, the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondent to each adverse ruling of the court:

"Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 49.

(Document marked as Respondents' Exhibit 49 for identification by the reporter.)

Mr. Lewis: Respondents next offer to prove by the witness John A. Kennedy the facts set forth in respondents' Exhibit 49, and state to the Court that if Mr. Kennedy were permitted to testify that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to the proposed testimony of John A. Kennedy on the grounds stated in the typewritten sheet attached to his proposed testimony
95 and I ask to have this marked as Government's Exhibit 107.

(Document marked Government's Exhibit 107 for identification by the reporter.)

Mr. Lewis: 66. Respondents offer to prove by the witness John A. Kennedy, duly sworn and on the stand ready to testify, that he is a resident of the village of Baudette in the Lake of the Woods County, Minnesota. That for thirty years he has been deputy U. S. Collector of Internal Revenue at said village of Baudette. That he first became interested in the vicinity of Lake of the Woods in the year 1886 and that for a number of years thereafter he was engaged in the cruising and timber business in said region.

67. Respondents further offer to prove by said witness that shortly after the placing of the stop logs in the Norman Dam in 1898 the low lands along the shores of said lake became flooded, and thereafter were used for flowage and storage purposes in connection with the development of water power. That during the early years of said period of flooding of said land he did not own any real estate in the vicinity of said lake, but that he remembers distinctly that the fact of the flooding of said land was the subject of a great deal of public and private discussion during said years, and that it

was a matter of common report, reputation and conversation during said years following 1898, and that it was a matter of common report, reputation and conversation during said years among the people residing in the vicinity of Lake of the Woods generally that said lands so flooded in connection with the development of water power were of higher value on that account and were more valuable for flowage and storage purposes than for any other use or purpose.

66-67. The Government objects to the testimony of John A. Kennedy on the ground that discussion, report and
96 reputation of high values which as a matter of law could not be reflected at market values are immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 68. Respondents further offer to prove by said witness that on or about the year 1910 he became a member of the association of property owners known as the Low Water Association, and that from that time down to the present time he has been a member of said Association of said property owners. That said association employed counsel to represent it and to represent the rights and interests of the property owners whose lands were so flooded. That said association at all times were active in an effort to collect compensation and damages for the use of said lands so flooded in the formation of a storage reservoir in said lake and also in obtaining for the members of said association the fair value of said lands for flowage and storage purposes. That in that connection said association employed the services and obtained the advice of men skilled and experienced in the determination of the value of flowage easements and the value of the use of property so used for flowage and storage purposes.

Mr. Harries: 68. Objected to as immaterial.

The Government also objects to all of the proposed testimony of John A. Kennedy and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer, [marginal] page 36, line 1 to [marginal] page 43, line 3 of this typewritten transcript.

The Court: Objection sustained.

Mr. Lewis: Exception."

97 That thereafter respondents offered in evidence Exhibit 50, the same being respondents offer to prove certain facts as set forth in said exhibit by witness GEORGE C. NEWTON, said Exhibit 50, the government's objection thereto and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

"Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 50.

(Document marked Respondents Exhibit 50 by the reporter for identification.)

Mr. Lewis: Respondents offer to prove by the witness George C. Newton the facts stated and set forth in Respondents' Exhibit 50, and state to the court that if Mr. Newton were permitted to testify that he would testify to the facts as set forth in said exhibit.

Mr. Harries: Subject to additional objections and further offers the Government objects to the testimony offered and to each item therein upon the grounds set forth in two typewritten sheets attached to the proposed testimony of George C. Newton and I asked to have this document marked as Government's Exhibit 108.

(Government's Exhibit 108 marked for identification by the reporter.)

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 69. Respondents offer to prove by the witness George C. Newton, duly sworn and on the stand ready to testify, that he is forty-five years of age. That he is a resident of Iron Mountain, Michigan, and has lived there for the past ten years. That he was graduated from the University of Wisconsin in 1907 in the mechanical engineering
98 course, and later took advanced work at said university in mechanical engineering, obtaining the advanced degree of mechanical engineer in 1921. That he is a member of the following engineering societies: American Society of Civil Engineers, being a charter member of the Duluth section of said society, American Institute of Mining and Metallurgical Engineer, Lake Superior Mining Institute. That he is a director of the Pigeon River Lumber Company, owning and operating a number of dams on the Pigeon River, being

boundary waters between the State of Minnesota and the Province of Ontario, Canada. That he has had twenty-five years general engineering experience along various lines. That during the past seventeen years he has had special experience in the investigation and construction of water power, flowage and reservoir projects, and in the appraisement, purchase, and sale of flowage easements and other properties connected said such projects. That during said period he has personally engaged in or has been connected with the appraisement, purchase, or sale of upwards of twenty-five flowage or storage reservoirs, among which are the Cloquet River Reservoirs of the Minnesota Power and Light Company in St. Louis County, Minnesota, the Minnesota Power and Light Company's project at Kaweshiwi Falls, on Falls Lake, near Winton, Minnesota, the Menominee River developments on the border between Michigan and Wisconsin, the Dead River and Hoist Dam Reservoirs of the Cliffs Power Company in Michigan, the Paint River Reservoir in Michigan, the Flambeau Reservoir of the Chippewa and Flambeau River in Wisconsin, the North Fowl and South Fowl and Royal Lakes Reservoir on the Pigeon River on the international border between Minnesota and Canada, the Arrow Lake Reservoir at the headwaters of Arrow River, a tributary of the
99 Pigeon River. That during the past eleven years he has been engaged as a consulting engineer, specializing in hydroelectric and mining projects. That during said period he has served as consulting engineer for the following companies, among other: Pickands-Mather Company of Cleveland, Ohio, Heineman Land & Power Company of Wausau, Wisconsin, B. C. Neely, of Crystal Falls, Michigan, Stevenson Estate of Milwaukee, Wisconsin, and Pigeon River Timber Company and other concerns interested in the development of power on the Pigeon River and tributaries.

70. Respondents further offer to prove by said witness that he is personally acquainted with the promotion and development of a number of hydroelectric projects in international boundary waters between the United States and the Dominion of Canada, among which are the St. John River Power Company project in the St. John River, being boundary waters between the State of Maine and the Province of New Brunswick, and the projects of the Pigeon River Lumber Company in the Pigeon River, being a part of the International boundary waters between the State of Minnesota and the Province of Ontario. That he is acquainted with the facts pertaining to the physical and international questions

and aspects involved in said development in international waters.

71. Respondents further offer to prove by said witness that he is well acquainted with the Lake of the Woods. That during the past two years he has owned and operated on said lake a cabin power boat for pleasure purposes, and has made numerous cruises in said boat throughout said lake and has become thoroughly familiar therewith and with the storage reservoir thereof. That he has made a thorough examination and study of the drainage area of said
100 lake and reservoir and of all physical facts, features, and questions affecting or involved in the development and use of said reservoir. That he has studied and become familiar with the document known as Water Resources Statements No. 3, of the Dominion Water Power Branch, Department of the Interior of Canada, published in 1915, entitled "Winnipeg River Power & Storage Investigations," by J. T. Johnston, also the document known as Water Power Resources Paper of the Department of the Interior of Canada, Dominion Water Power and Reclamation Surveys, Nos. 31, 54 and 57, as well as considerable other literature and engineering and statistical data and information relating to the Power resources and developments of the Lake of the Woods and the Winnipeg River. That he has visited and inspected the power projects at the outlets of the Lake of the Woods and in the Winnipeg River, and that he knows the power capacities of said Lake and river and the extent of the development thereof up to the present time. That he has visited the city of Winnipeg and the Villages of Kenora and Rainy River, and intervening points in Canada, and the Villages of Warroad, Baudette and intervening points in the State of Minnesota as well as many other points around the shores of Lake of the Woods in Minnesota and Canada. That he is familiar with the character of the lands involved in these condemnation proceedings.

Mr. Harries: 71. The Government objects to the use of Water Resources Papers and other undescribed documents as hearsay, not affording opportunity for examination, and as untested as to accuracy.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 72. Respondents further offer to prove
101 by said witness that he has heard or has read the official reporter's transcript of all the testimony given by Adolph F. Meyer in this proceeding relating to the

facts and conditions of the Lake of the Woods, of the watershed of said lake, of the storage reservoir of said lake, of the Winnipeg River, of the power developments and other works in said lake and river, of the control that has been exercised and the use that has been made of the waters of said lake and river and particularly of the storage reservoir of said lake by means of said power developments and other works; also the testimony of said Adolph F. Meyer as to the facts and conditions of the resources and capacities of all of said waters for power and other purposes.

Mr. Lewis: 73. Respondents further offer to prove by said witness that he is familiar with the rules, regulations and practice of the International Joint Commission, the Federal Power Commission of the United States, and the Department of Lakes, Forests, and Mines of the Province of Ontario, Canada, with reference to the development and establishment of storage reservoirs, power projects and other projects in international boundary waters. That he has prepared applications for such projects for presentation of said International Joint Commission and for other authorities.

Mr. Lewis: 74. Respondents further offer to prove by said witness that the physical and international aspects of the development and use of the Lake of the Woods reservoir are similar in character to the physical and international aspects of said St. Johns River Power Company development, which has been carried out by private enterprise under authorization of said International Joint Commission, and
which involves the construction of a dam entirely
102 within the Province of New Brunswick, Canada, overflowing lands both in said province and in the State of Maine.

Mr. Harries: 74. The Government objects to this testimony on the ground that the testimony relative to the St. John River is not sufficiently specific to afford a basis for qualification for comparison with the Lake of the Woods.

Mr. Lewis: 75. Respondents further offer to prove by said witness that he knows of no reason why the flowage easements required for the Lake of the Woods reservoir could not be utilized and the storage capacity of said reservoir developed by private enterprise without governmental aid or co-operation other than such authorization as the Governments of the United States and Canada have extended and granted as a matter of common practice pursuant to the rules and regulations of the International Joint Commission

and other authorities which have been mentioned. That he is of the opinion that said flowage easements and storage capacity could have been so utilized and developed by private enterprise.

Mr. Harries: 75. While the Government admits that the witness has no knowledge of the obstacles to utilization of the storage capacity of the lake, the Government objects to evidence that this witness "knows of no reason why flowage easements required for the Lake of the Woods reservoir could not be utilized and the storage capacity of said reservoir developed by private enterprise" upon the ground that this lack of knowledge by the witness has no tendency to prove the practicability of such utilization and development; or that it enhanced market values of the shore lands; and further objects to the testimony as stating a conclusion for which no proper foundation has been laid.

103 The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 76. Respondents further offer to prove by said witness that he has had extensive experience during the past seven years in buying and selling flowage rights and easements on his own account or on account of the companies in which he was interested or on account of clients whom he represented. That during said period he has been engaged in or directly connected with the appraisement, buying and selling of flowage easements and storage rights totalling in value and price in the neighborhood of ten million dollars.

That during said period he has had extensive experience in connection with the sale, purchase, and acquisition of flowage rights and easements without the intervention of the exercise of the right of eminent domain, and that in the greater part of such transactions with which he has been connected the right of eminent domain was not exercised. That the State of Michigan, where he has had extensive experience in connection with such transactions, the right of eminent domain was not available to corporations or companies for the purpose of developing storage reservoirs or water power for a period of sixty years or more prior to the year 1928. That he knows of his own knowledge that there has been no condemnation of flowage rights of easements in the State of Michigan by such corporations or companies for the past sixty years or more up to the present time, but that nevertheless during said period many large and important storage reservoirs have been created and developed by such corporations

and companies in said state, involving the acquisition in connection with various single projects of many hundreds of separate easements belonging to separate and distinct property owners.

104 Mr. Harries: 76. The Government objects to this evidence upon the ground that it is irrelevant and immaterial and has no bearing upon the valuation of lands in the State of Minnesota bordering on international waters; and further objects to the testimony as stating conclusion of law.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 77. Respondents further offer to prove by said witness that it is his opinion that it would have been entirely practicable and feasible to acquire said flowage rights and easements necessary to the formation of a storage reservoir such as has been formed in the Lake of the Woods up to contour 1064 by private enterprise and without invoking or resorting to the exercise of the right of eminent domain.

Mr. Harries: 77. The Government objects to this testimony upon the ground that it states a legal conclusion; that no foundation has been laid by stating the elements to be taken into account; and upon the ground that the evidence shows as a matter of law that it would not have been practicable or feasible for private enterprise to attempt to form a reservoir; and upon the ground that the opinion of the witness is immaterial inasmuch as the practical possibility of completing the enterprise was as a matter of law too remote to affect market value.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 78. Respondents further offer to prove by said witness that there is no market value for flowage easements or for flowage or storage rights in the State of Minnesota and other northwestern states, within the usually accepted meaning of the term "market value". That the value of flowage easements and storage rights for storage
105 reservoirs is determined as a matter of custom and practice by reference to the special facts and circumstances involved in each instance. That there is a certain custom and practice recognized and followed by hydraulic engineers and by appraisers, owners, and users of flowage ease-

ments and storage rights, whereby the value of such easements and rights is determined. That he knows what said certain custom and practice is.

Mr. Harries: 78. The Government objects to the evidence in the first sentence of the foregoing paragraph upon the ground that it constitutes a conclusion of law; that no foundation has been laid for this testimony; that custom and practice cannot overcome a settled principle of law that damages in condemnation proceedings are to be measured by the difference in market value of the property affected by the condemnation.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 79. Respondents further offer to prove by said witness that according to said custom and practice the value of flowage easements and storage rights for storage reservoirs is arrived at by the exercise of judgment by persons skilled and experienced therein, based upon engineering experience, taking into consideration the availability for use of such easements and storage rights, the relative proximity in point of time of such use and the economic value of such use.

Mr. Harries: 79. The Government objects to this evidence upon the ground that engineering experience is not a prerequisite to the determination of market value; that the economic value of a "use" is not the measure of damage in these condemnation proceedings; and that the foregoing testimony is immaterial.

106

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 80. Respondents further offer to prove by said witness that the value of flowage easements and storage rights may be appraised with much greater certainty where the reservoir of which such easements form a part has been actually formed and is in existence, and where the use thereof has actually been determined.

Mr. Harries: 80. To which the government objects on the ground that the testimony is immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 81. Respondents further offer to prove by said witness that he has made a thorough examination, inspection, and study extending over a period of three years of the Lake of the Woods and its principal drainage area, of the dams, power plants and other works at the outlets of said lake and in the Winnipeg River, of the possible sites and power developments at said outlets and in said river, of the flows of waters into and out of said lake, of the storage reservoir formed in said lake, and of the operation and use of said storage reservoir. That through said examination, inspection, and study he has become familiar with and knows the uses of said storage reservoir which are immediately available and the possible uses to which the same may be put.

Mr. Lewis: 82. Respondents further offer to prove by said witness that he has made an examination and appraisal of the lands upon which it is necessary to acquire a flowage easement up to contour 1064 for said storage reservoir and that he knows the fair value thereof. That he has
107 made an examination and appraisal of the flowage easement sought to be acquired in these proceedings on the lands of Elias Olson, Harry Brewster and Randor G. Karlson, up to contour 1064, as described in the petition herein, and that he knows what is the fair value of each of said easements, or what is sometimes referred to as the fair market value of said easements, considering that there is no actual general market for such easements, as the term "market" is commonly used.

Mr. Lewis: 83. Respondents further offer to prove by said witness that the fair value of said flowage easements, sometimes referred to as the fair market value, as previously stated, is as follows:

On the lands of Elias Olson $11,200;

On the lands of Harry Brewster $18,000;

On the lands of Randor G. Garlson $12,200.

Mr. Harries: 83. The Government objects to the foregoing testimony upon the ground that no sufficient foundation has been laid, but that on the contrary the witness, in stating that there is no general market for the property he values, clearly shows that he is incompetent to testify as to market values, which alone constitute the measure of damages in

this case. The Government further objects to the testimony of values by this witness upon the grounds that adaptability for flowage purposes could not, as a matter of law, have affected market values because of the practicable impossibility of carrying out the project without the intervention of eminent domain and the formation of international agreements.

* * * *

The Government also objects to all of the proposed testimony of Gardner S. Williams and George C. Newton,
108 and to each item thereof, upon each of the grounds stated immediately after the offer to prove previously made by means of the witnesses Gardner S. Williams and George C. Newton, and Adolph F. Meyer.

The Court: The objection will be sustained.

Mr. Lewis: Exception."

That thereafter respondents offered in evidence Exhibit 51, the same being respondents' offer to prove certain facts as set forth in said Exhibit by witness H. C. HABSTRITT, said Exhibit 51, the government's objection thereto and the court's ruling thereon are as follows; exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

"Mr. Lewis: I ask to have this document marked as Respondents' Exhibit number 51.

(Document marked Respondents' Exhibit 51 for identification by the reporter.)

Mr. Lewis: Respondents offer to prove by the witness H. C. Habstritt the facts set forth in Respondents' Exhibit 51 and state to the court that if Mr. Habstritt were permitted to testify he would testify to the facts set forth in said exhibit.

Mr. Harries: The Government objects to the admission of the evidence of the proposed testimony upon the grounds set forth in the typewritten sheets attached to the copy of the Exhibit just offered by respondents, and I ask to have them marked as Government's Exhibit 109.

(Document marked Government's Exhibit 109 for identification by the reporter.)

Mr. Lewis: 84. Respondents offer to prove by the witness Habstritt, duly sworn and on the stand ready to
109 testify, that from 1905 to 1910 he was a resident of the Village of Baudette in Lake of the Woods County, Minnesota. That since 1910 he has been a resident of Roseau in the County of Roseau, Minnesota. That for the past 15 years he has been engaged in the real estate business. That he is thoroughly acquainted with the transfers of real property made in Roseau County during said time.

Mr. Lewis: 85. Respondents further offer to prove by said witness that he has never known or heard of a sale or transfer of a flowage easement on any of the lands in Lake of the Woods or Roseau County.

Mr. Harries: 85. Objected to as immaterial; damage in condemnation proceedings are determined by taking the difference in value of the entire tract affected by an easement before and after the taking; and the absence of conveyance of easements as such, does not disprove a market on which damages in condemnation shall be based; besides, the record conclusively shows by certified copies of recorded instruments of conveyance of flowage rights, that transfers did, in fact, occur.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: Respondents further offer to prove by said witness that he personally knows of and had personal connection with the sale and transfer of a number of tracts of land in Roseau County wherein the purchase was made solely because of the value and reputed value of the land in question for flowage and storage purposes on Lake of the Woods and wherein the seller of said land sold same because he was in financial distress and forced so to do.

Mr. Harries: 86. To which the government objects on the ground that the evidence is immaterial; that the
110 witness has not shown himself competent to testify as to motive save by hearsay; and that the allegation that the sale was forced is not the best evidence.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: 87. Respondents further offer to prove by said witness that ever since 1905 it has been a matter of common report, reputation and conversation among the people generally residing in Lake of the Woods and Roseau Counties that the lands in the vicinity of the Lake of the Woods which were being flooded by the storage of water in the Lake of the Woods was of high value for flowage and storage purposes, and that it was a matter of common report, reputation, and conversation among said people that said lands so flooded were more valuable for flowage and storage purposes than for any other use or purpose.

Mr. Harries: 87. The Government objects to the foregoing testimony of a higher "use value" on the ground that it is immaterial since as a matter of law the possibility of use for flowage could not be reflected in market values because of the impossibility of making such use of the lands by any means other than the means now invoked, i. e. by international treaty and eminent domain.

The Government also objects to all of the proposed testimony of H. C. Habstritt and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Harries: May the record also show, Your Honor, that the Government objects to the offers to prove on the
111 part of respondents, as to each item thereof, upon the grounds that were stated at length to the Court at the opening of court on Tuesday morning, January 27th last, see [marginal] page 36, line 1, to [marginal] page 43, line 3, herein.

The Court: Yes, the record may so show.

Mr. Harries: And, if the Court please, counsel for Canada has asked me to request leave of the Court to file, as a part of the objections to the receipt of this testimony, the brief which was handed to the Court at the times in question of reservoir values was first raised, and he asks that that appear in the record, probably at this point.

The Court: Well, the record may so show, then,—he wants the record to show that objections were made to the admission of this evidence, for the reasons stated in his brief?

Mr. Harries: Yes, Your Honor.

Mr. Lewis: And may I ask the record show, Your Honor, that in each of these offers to prove, which respondents have made, that each fact recited in the typewritten form, or the offer to prove, which is reduced for convenience to typewriting,—that each fact is offered separately in connection with each one of the offers?

The Court: Yes, that will be the understanding.

The Court: Now, it is my understanding that the Government makes no point of the fact that each one of these witnesses was not called to the stand and sworn before the offer of proof was made?

Mr. Harries: No, Your Honor."

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112 That thereafter respondents offered in evidence Exhibit 55, the same being respondents' offer to prove certain facts as set forth in said exhibit by witnesses GEORGE C. NEWTON and GARDNER S. WILLIAMS, said Exhibit 55, the government's objection thereto and the court's ruling thereon are as follows, exception being duly noted by and on behalf of respondents to each adverse ruling of the court:

(Respondents' Exhibit 55 marked for identification by the reporter)

"Mr. Lewis: The respondents further offer to prove by the witnesses Gardner S. Williams and George C. Newton, the facts set forth in Respondents' Exhibit 55, and I will say to the court that if the witnesses Williams and Newton were permitted to testify, that they would testify to the facts as set forth in said Exhibit 55, consisting of about one and one-quarter typewritten pages.

Mr. Harries: The government objects to the testimony proposed in the offer last made, upon the grounds as stated in the typewritten instrument, to be marked by the reporter

as Government's Exhibit 117, and which I now hand to the reporter for the purpose of being marked and put in the record in this case.

(Instrument just referred to marked for identification as Government's Exhibit 117 by the reporter.)

(The respondents offer to prove by Williams and Newton, marked as Respondents' Exhibit 55, and the objection by the government to such offer marked as Government's exhibit 117, are in the words and figures as follows:)

"Respondents' Offer to Prove

Gardner S. Williams and George C. Newton.

Mr. Lewis: Respondents' offer to prove by the wit-
113 nesses Gardner S. Williams and George C. Newton, that flowage rights and easements are the subject of purchase and conveyance in the State of Minnesota as separate and distinct units of property, and that such rights and easements not infrequently are rented as well as sold. That such flowage rights and easements have a recognized rental value, and that said rental is determined and arrived at in a manner similar to the process of negotiation whereby the fair value, or as sometimes stated the fair market value, of such flowage rights and easements is determined, as described in the foregoing offers to prove by said witnesses.

Mr. Harries: The Government objects to this testimony on the ground that it constitutes a conclusion of law; and is immaterial inasmuch as rental values are not the measure of damage in a condemnation proceeding; and as a matter of law could not have been reflected in the market value of the property affected by the easements.

Mr. Lewis: Respondents further offer to prove that said method of arriving at the fair rental value of such flowage rights and easements is the standard custom and practice usually and customarily followed and employed by persons who engage in the rental of said flowage easements. That said witnesses have had experience in the determination of such fair rental value, and are acquainted with the custom and practice by which said fair rental value is customarily agreed upon and determined.

Mr. Harries: The Government objects to this testimony on the ground that custom and practice in determining rental

values of easements are not material and do not go to the measure of damage in this proceeding.

Mr. Lewis: Respondents further offer to prove that what is the fair rental value of any given flowage right
114 or easement must be determined by a consideration of all the factors and conditions affecting each particular tract or case, and that such consideration and the determination of what is the fair rental value based thereon, is a matter of expert opinion arrived at by the exercise of engineering and market and business experience.

Mr. Harries: Objected to as a conclusion of law and as immaterial.

Mr. Lewis: Respondents further offer to prove by said witnesses Williams and Newton that they are acquainted with the lands involved in these proceedings, and with the circumstances and facts which should be taken into consideration in determining the fair rental value of the flowage easement sought to be imposed on said lands.

Mr. Harries: Objected to as a conclusion of law.

Mr. Lewis: That they have given careful study to all said facts and conditions, and that they have formed an opinion based upon their knowledge and experience as to what is the fair rental value of each of said easements.

Mr. Lewis: Respondents further offer to prove by said witness Gardner S. Williams, that the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Elias A. Olson, described in the petition for said easement is $864.00.

Mr. Harries: To this evidence the government objects on the ground that it is immaterial and not a proper measure of damage in this proceeding; and upon the further ground that rental value was not, and as a matter of law could not be reflected in the market value of the tracts affected by the imposition of the easement because the union of properties necessary was not so practicable that the possibility would affect the market value and such union would not have
115 been practicable or have been attempted except by the intervention of eminent domain.

Mr. Lewis: That the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Harry Brewster, described in the petition for said easement is $1064.00.

Mr. Harries: To which the Government objects on the same ground as last above noted.

Mr. Lewis: That the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Randor G. Karlson, described in the petition for said easement is $752.00.

Mr. Lewis: Respondents offer to prove by said witness George C. Newton, that the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Elias A. Olson, described in the petition for said easement is $896.00.

Mr. Harries: To which the government objects on the same ground as stated to the offer contained in paragraph 93.

Mr. Lewis: That the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Harry Brewster, described in the petition for said easement is $1440.00.

Mr. Harries: Same objections as interposed to the offer in paragraph 93.

Mr. Lewis: That the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Randor G. Karlson, described in the petition for said easement is $976.00.

Mr. Harries: Same objections as interposed to the offer of proof made in paragraph 93.

The Government also objects to all of the proposed
116 testimony of Gardner S. Williams and George C. Newton, and to each item thereof, upon each of the grounds stated immediately after the offer to prove previously made by means of the witness Gardner S. Williams and George C. Newton, and Adolph F. Meyer.

The Court: The objections will be sustained.

Mr. Lewis: Exception."

MR. WILLIAM RULIEN was sworn as a witness on behalf of respondents-appellants and testified that for approximately 25 years he has lived in or near the village of Baudette on the shores of the Lake of the Woods, and that he is engaged in the real estate business. That for 6 or 7 years he has been an appraiser for the Minnesota Rural Credit Bureau. That during the years 1914, 1915 and 1916, the International Joint Commission held public hearings at the villages of Warroad and Baudette with reference to the regulation of the level of the water in the Lake of the Woods. That he did not know of any flowage easements having been bought or sold on the shores of the Lake of the Woods other than such as have been sold to the Government.

Respondents offer to prove by said witness Rulien that there has been throughout Roseau and Lake of the Woods Counties, on the shores of the Lake of the Woods, a great deal of public and private discussion and common talk among people generally regarding the flowage easements and their value, to which objection was made by the Government on the ground that it is immaterial, hearsay and incompetent. The objection was sustained and an exception noted.

117 Respondents further offered to prove by said witness Rulien that he had heard a great many people who attended the hearings of the International Joint Commission at Warroad and Baudette, from and since said hearings were held in 1914, 1915 and 1916, discussing the statements which had been made by the members of the International Joint Commission and their advisors, and that the flowage easements here in question, and the value of the lands below contour 1064 were very valuable, to which the Government objected on the ground that the same is hearsay, incompetent, irrelevant and immaterial. That objection was sustained, and exception duly noted.

Respondents further offered to prove by said witness Rulien, that there was at all times, following the hearings held by the International Joint Commission in the Counties above named, a great deal of public discussion and current rumor to the effect that the lands below contour 1064 and the flowage easements here in question, and the flowage rights on said lands, were of much higher value than the lands above contour 1064, to which offer the Government objected on the ground that the same is incompetent, irrelevant and immaterial. Said objection was sustained, and exception duly noted.

The witness Rulien testified that in 1916 he bought 160 acres of land below contour 1064, and that it was practically all under water when he bought it; that he bought it because of its value for reservoir purposes; that he paid more for it because it was so useful and available for reservoir purposes than he would have paid for it if it had not been useful and available for that purpose; and that he would not have purchased it at all except for the fact that it was useful and available for reservoir purposes.

Later in the course of the trial, the court being
118 of the opinion that respondents might not recover any value which their land possessed because it formed a part of the storage reservoir, struck all of Mr. Rulien's evidence, on motion of the government. Respondents duly excepted.

William Rulien, a witness called on behalf of respondents, being first duly sworn testified as follows:

Cross-Examination.

By Mr. Harries:

Q. Did you testify at the last trial, Mr. Rulien, that you had been engaged in buying and selling land along the south shore of the lake for many years?

A. Yes, I think I did.

Q. And you knew all about the sales, or practically all, that were made at the Lake of the Woods, of all such lands?

A. I know a great number of them.

Q. You so testified before, did you not?

A. Yes, I think so.

Q. That you had known of the majority of them?

A. Yes, sir.

Q. Is that so? A. Yes, sir.

Q. And that you had made the majority of them yourself, isn't that true? A. Possibly.

Q. Did you testify on the last trial that in making the sale of land that you had made, nobody on either side of the transaction had even taken into consideration the power or the reservoir value in connection with these lands?

A. In making any sales,—not in any sales that I made.

Q. Sir?

A. I never represented any reservoir values in any sales that I made.

* * * * * *

Q. So that we may understand each other: Any sales with which you had contact, or with which you were involved,

or any which you had heard of, having to do with sales in Roseau and Lake of the Woods, whether on the shore of the Lake of the Woods or elsewhere, in none of these has this element of reservoir value entered in the transaction, is that correct?

A. As I understand the question was, if I had heard of any sales, or if I had made any sales myself?

Q. Yes.

A. Or where that element was discussed?

Q. Yes. A. In making the sales?

119 Q. Yes. A. I have not.

Q. You have not heard of any since, have you?

A. Yes, the Government buying the easement.

Q. None outside of that? A. No.

* * * * * * *

Q. And I take it that you probably know more about the selling price of land in your region than anybody else at least, as much? A. Yes, I think so.

Q. You are familiar with the market value, both of lands in Roseau and Lake of the Woods Counties, on the shore and elsewhere, is that true? A. Yes, sir.

Q. Did you testify at the last trial that you did not know of anyone who had sold any land where the element of the reservoir value had entered into the transaction?

A. I believe I did.

Q. Is that a fact? A. Yes, sir.

Q. It was not taken into consideration by any purchaser, or by any seller of land along the lakeshore, that you know of?

A. Not in any sales that I was connected with.

Q. And you were connected with a substantial number of them? A. Yes, sir.

Redirect Examination.

By Mr. Lewis:

Q. Now, did I understand you right when you said that any lands which you sold were above 1064?

A. Yes, sir.

Q. Then let me ask you what you referred to, in the question which counsel read to you from the record of your testimony heretofore, that the element of the value of these lands for reservoir purposes had not been taken into consideration in connection with what lands you were testifying to, lands above 1064 or below 1064?

A. Lands above 1064.

Q. And have you ever understood that the lands above 1064 have had any value for reservoir purposes?

A. No, I have not.

Q. And so far as you know, it has never been taken into consideration in connection with any land above 1064?

A. No.

120 Q. Do you recall that in 1921 you were grantee to a tract of land in which he (Zippel) was named as grantor?

A. Yes, I did.

Q. Do you know whether it is under 1064, or below 1064?

A. I don't know, no.

Q. You don't know anything about that?

A. I don't know a thing about it.

Q. Are there any other pieces of land that you have transferred, or with the transfer of which you have had some connection, the elevation of which you would not know?

A. Yes. I have not made it a point to look up the elevation of the lands that I was selling.

(The following questions and answers appear in the reporters' transcript immediately after the foregoing, and are included in this record by consent of Government's counsel:)

Q. I see. You were not concerned with that element particularly in connection with those Tracts?

A. I was not trying to sell land that I thought would be covered by water. I could not very well represent it as a farm proposition. There is lots of other land to sell.

Q. So that you did not go into that question at all?

A. I did not try to sell reservoir land.

Q. Well, you did not go into the question then on that account, for that reason? A. No.

121 The Court: If there is any other evidence that you think the Court should have outside the testimony which this witness which you are putting on will testify to, I presume these witnesses are going to testify to their having made purchases of land below 1064 with the idea that they had a greater value than other lands up there on account of their use for reservoir purposes, of course I could receive that."

Mr. Lewis: This suggestion occurs to me in that connection; we are all interested in shortening the time and if anything develops in the argument where a question of fact becomes material, upon which there is no evidence, counsel can state to the court what the fact would be on that, and in that way probably shorten the time a great deal.

The Court: That was what I was thinking. I think we can take care of the whole thing by discussing it at this time.

Of course there is no object in the jury remaining here to listen to the arguments of counsel; in fact I might state to the jury that I do not know how well you grasp the situation, but the question which I am going to be called upon to decide as a question of law is whether we shall listen to all the evidence relative to the use which could be made of the waters of the Lake of the Woods in developing power, and the value of the power interests on the Winnipeg River, and as to what bearing that has on the question of the value of the lands, or whether as a matter of law that should be excluded and we confine ourselves simply to the market value of the lands for other purposes. Of course that is a big question in the case and they want to present it to me first as a question of law, and according as to how that is decided will depend the length of this trial and the amount of evidence which will have to be received, and I think we have reached a point now where I probably have sufficient information so that I can pass, either one way or the other, upon that question. It is not a matter which concerns you at the present time. It is simply a question of law; so you can be excused until 2 o'clock this afternoon, and just leave the court room if you will please, and be back here at that time.

(Jury leaves court room)

Statement by Mr. Lewis pages 32 and 33 and the first 6 lines of 34 herein. Jury returns.

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122 Thereupon respondent HARRY BREWSTER was sworn as a witness on behalf of respondents. Respondents offered to prove by said witness Brewster that in the year 1922 he purchased 160 acres of land because it had a value, and was reputed to have a value, for storage and reservoir purposes, and that he paid a higher price for said tract of land because of the fact that it had, or was reputed to have, a higher value for flowage and reservoir purposes; and that he would not have purchased said tract at all, except for the fact that it had, or was reputed to have, a higher value for flowage and storage purposes,—to which offer the government objected on the ground that the motive for such acquisition was immaterial and the testimony offered was incompetent, irrelevant and immaterial. Government counsel stated that there was no objection to testimony on the part of the witness as to the price he paid for the lands involved in this proceeding. The objection was sustained and an exception duly noted.

Respondents further offered to prove by said witness Brewster that the reasonable and fair value, and the fair market price of the easement which the government seeks to impose upon his land in these proceedings is $60,000,—to which the Government objected on the grounds last above stated. Said objection was sustained and exception duly noted.

Thereafter the witness Brewster testified as follows:

By Mr. Lewis:

"Q. Mr. Brewster, will you state what would be the fair market value of your 220 acres which you say are below contour 1064, and upon which the Government is seeking to impose a flowage easement, before that easement is im-
123 posed upon it, that is, when you have and own the full flowage rights on these lands?

A. $300.00 an acre."

* * * * * *

"Q. All right. Now what is the fair market value of these lands below contour 1064 with the easement imposed upon it?

A. Nothing. It is valueless."

* * * * * *

Cross-Examination.

By Mr. Harries:

"Q. And in telling us the valuation that you put on your land per acre, what basis did you have for the figures that you named? A. For power purposes.

Q. Were those the only purpose you had in mind?

A. Yes, sir.

Mr. Harries: The Government moves that the testimony of Mr. Brewster relative to the valuation of this land be stricken."

The Government's said motion was granted, and respondents duly excepted.

Mr. Harries: The Government has no objection to testimony on the part of this witness as to the price he paid for the lands involved in this proceeding, but objects to any testimony as to the motive he may have had in acquiring the same, on the ground that it is incompetent, irrelevant and immaterial.

Respondent ELIAS A. OLSON, was next duly sworn as a witness on behalf of respondents, and after stating that he was born in Sweden, and had been in the service of a company engaged in dam construction, the following proceedings were had:

"Q. Just very briefly tell the Court and the Jury what connection you had with water power over in the old country?
A. I used to work on the dam construction."

* * * * * *

Q. And did you learn when you were over there in the old country anything about whether the lands that were covered with water, and had formed a part of the reservoir, were more valuable or less valuable on that account, than were the other lands?
A. More or less valuable, yes.
Q. What was it, more valuable or less valuable?

124 Mr. Harries: Just a moment. We object to that on the ground that it is immaterial.

The Court: The objection is sustained.

Mr. Lewis: We offer to prove by the witness and respondent Olson, now on the stand, that through his employment in Norway in connection with the construction of water-power dams, and his connection with water power projects, that he learned that the lands used for flowage and storage purposes were more valuable on that account than were other lands; which offer was objected to as immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

* * * * * *

Q. Did you know about the power plants that were built, and that they were operating down in the Winnipeg River?

Mr. Harries: We object to that inquiry on the ground that it is utterly immaterial, and on the further ground that the Court has already ruled on the question of the admissibility of this testimony.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: We offer to prove by this witness and respondent Olson, that before filing for the homestead which

he later acquired, he had been in the city of Kenora in the Dominion of Canada, where some of the dams here in question, and which obstruct the outlet of the Lake of the Woods, had been constructed, and that he was acquainted with the fact that extensive and valuable hydro-electric power plants had been built, and were in operation in the Winnipeg River.

Mr. Harries: To which we object on the ground that the offer of that testimony is incompetent, irrelevant and immaterial, and without proper foundation.

The Court: The objection is sustained.

Mr. Lewis: Exception.

125 By Mr. Lewis:

Q. Will you state, Mr. Olson, what was your intention and your purpose in filing on the particular piece of land which you did file on, and which you later acquired as your homestead?

Mr. Harries: That is objected to as immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: Respondents offer to prove by the witness and respondent Olson that his intention and purpose in filing on the tract of land which he later acquired as a homestead was because of the fact that said lands possessed and were reputed to possess high value for flowage and storage purposes.

Mr. Harries: To which the government objects on the ground that the motive of acquisition is immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

* * * * * *

Q. Will you state to the Court and Jury what is the fair value and the fair market value of that flowage easement?

Mr. Harries: Just a moment. That is objected [as] as incompetent, irrelevant and immaterial, not a proper measure of damage.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: The respondent Olson being the owner of the flowage right and easement sought to be acquired by the Government, offers to prove by his own testimony that the reasonable value and market price of said easement is $16,000.00.

Mr. Harries: To which the Government objects upon the ground that no proper foundation has been laid, and
126 upon the further ground that the proposed testimony would not be based upon the proper measure of damage in the proceedings in this court:

The Court: The objection is sustained.

Mr. Lewis: Exception.

* * * * * *

Q. For all purposes, I said; what is the value of the 56 acres of land for all purposes? A. Including storage?
Q. And everything else?
A. About $300.00 an acre.
Q. $300.00 an acre? A. Yes, sir.
Q. And what is the value of that same tract of land below contour 1064, after the flowage easement is imposed upon it?
A. No value. It will be of no value.
Q. No value? A. No value."

Elias A. Olson, a witness called on behalf of respondents, being first duly sworn, testified as follows:

Q. For all purposes, I said; what is the value of the 56 acres of land for all purposes?
A. Including storage?
Q. And everything else?
A. About $300.00 an acre.
Q. $300.00 an acre? A. Yes, sir.
Q. And what is the value of that same tract of land below contour 1064, after the flowage easement is imposed upon it? A. It will be of no value.
Q. No value? A. No value.

* * * * * *

Q. Part of your land there is below contour 1064?
A. Yes.
Q. How did you locate that contour, Mr. Olson?

A. I did not locate it.
Q. Who did? A. I suppose the engineers did.
Q. Well, you don't know where that contour line runs on your land then, I take it. A. No.
Q. And you think your land, below that line, is worth $300.00 an acre, you said? A. Yes, I do.
Q. How did you figure that out?
A. On account of that the land would be suitable for water storage.
Q. For water storage? A. Yes.
Q. What do you mean by water storage?
A. To store the water for use for electric power.

Mr. Harries: The Government moves that the testimony of this witness relative to the value of lands below contour 1064 be stricken on the ground that it is based upon an incompetent and immaterial element of damage.

* * * * * * *

The Court: The evidence may be stricken.

Mr. Lewis: Exception.

Mr. Harries: The Government moves that the testimony of this witness relative to the value of lands below contour 1064 be stricken on the ground that it is based upon an incompetent and immaterial element of damage.

Mr. Lewis: That is objected to, if the Court please, for the reason that as we understand the rule of law, the owner of land is entitled to show and to prove all uses to which his lands are reasonably adaptable.

The Court: The evidence may be stricken.

Mr. Lewis: Exception."

Thereafter respondent RANDOR G. KARLSON was sworn as a witness on behalf of respondents, and stated that he was one of the respondents and the owner of 160 acres, practically all of which was below contour 1064, and upon which the government sought to impose a flowage easement. That he purchased said tract in 1921. Whereupon the following proceedings were had:

127 "Q. I see, and you know that that condition existed (flooding of this land) as far back as 1915? A. Yes.

Q. Well then let me ask you again if I may, to complete the record, why, under those circumstances did you buy that 120 acres that you say you bought in 1921?

Mr. Harries: Objected to as immaterial.

The Court: Objection sustained.

Mr. Lewis: Exception. The respondent offers to prove that the reason why he bought the 120 acres here in question in 1921 under the circumstances just disclosed by the evidence is because the said 120 acres was valuable and was reputed to be valuable for storage and flowage purposes.

Mr. Harries: To which the government objects on the ground that the motive of purchase is immaterial.

Mr. Lewis: Respondent further offers to prove that he paid a higher value for said 120 acre tract purchased in 1921 because of the fact that it possessed a higher value for storage and flowage purposes, than he otherwise would have paid, except for the fact that it possessed such higher value.

Mr. Harries: To which the Government objects on the ground that the action of the respondent in paying more or less for his property at a given time has no bearing on the question of its value at the time of the award of the Commissioners in these proceedings.

Mr. Lewis: Respondent further offers to prove that at the time he purchased said 120 acre tract he purchased the same on a forced sale; that the grantor who sold and conveyed said 120 acre tract to him was in financial distress and unable to meet his obligations, and that he conveyed and sold said tract to him under those circumstances and for those reasons.

128 Mr. Harries: Objected to as immaterial.

The Court: Objection sustained.

Mr. Lewis: Exception.

Q. Mr. Karlson, what is the fair value, and the fair market value of the flowage easement which the Government is seeking to impose upon your tract of land below contour 1064, which land is involved in these proceedings?

Mr. Harries: Objected to as incompetent, irrelevant and immaterial, and not the true measure of damage.

The Court: Objection sustained.

Mr. Lewis: Exception. The respondent offers to prove that the fair value of the flowage easement on the tract of land involved in these proceedings below contour 1064 is $44,000.00.

Mr. Harries: To which we object on the ground that the value of the flowage easement is not the true value, or not the true measure of the damage sustained by the respondent in these proceedings.

The Court: Objection sustained.

Mr. Lewis: Exception.

Q. When you went up into the country did you hear any common report or talk among the property owners up there, and the people up there generally, with reference to the value of lands below contour 1064? A. Yes.

Q. What was that common report and talk that was heard with reference to the value of these lands and the reasons for their being valuable or for their not being valuable?

Mr. Harries: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Lewis: Exception. One more question.

129 Q. Mr. Karlson, did that common report and talk and conversation about the value of these lands continue from the time that you went up there, clear down to the present time? A. Yes.

Q. And has that common talk and report that has been abroad in that neighborhood with reference to the value of these lands been substantially the same all the time from the time you went up there in 1904, down to the present time?

A. Practically, yes.

Mr. Lewis: Respondent offers to prove that when he went to the Lake of the Woods country in 1904 he found a great deal of conversation, common report and reputation abroad, among the property owners, and among the public generally in that community to the effect that the lands below contour 1064 were very valuable for storage and flowage purposes, that the power companies were using said lands below contour 1064 for storage and flowage purposes and that said lands were more valuable for that purpose than they were

for any other use and purpose; that the value of said lands for use as storage and for reservoir purposes existed at that time and that the Canadian companies which had so used said lands were then owing to the owners of said property, substantial sums of money on account of said use of their lands.

Mr. Harries: To all of which the Government objects on the ground that the inquiry is incompetent, irrelevant and immaterial, and not the proper measure of damage in this proceeding.

The Court: Objection sustained.

Mr. Lewis: Exception.

* * * * * *

Q. Do you know what is the most valuable use and purpose to which these lands may be devoted? A. Yes.

Q. What is their most valuable use?

A. For reservoir and storage purposes.

130 Q. Do you know now what is the reasonable market value of the use of your lands for storage purposes and flowage purposes?

Mr. Harries: Objected to on the ground that he is not competent to testify on that subject.

The Court: Objection sustained.

Mr. Lewis: Exception.

Q. You may state, Mr. Karlson, whether the value to which you testified a moment ago, is the value that is placed upon those lands generally by the people in that community who are acquainted with the lands, and were acquainted with the value and use of those lands?

Mr. Harries: Just a moment—objected to as without proper foundation, and hearsay and incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Lewis: Exception."

That previously respondent and witness Karlson testified that the fair market value of his land involved in these proceedings before the government imposed the flowage easement upon it was $275.00 per acre, and that said land after the imposition of said easement upon it, was worthless.

That the court, on motion of the government, struck said testimony from the record, and that respondent duly excepted thereto.

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131 RANDOR G. KARLSON, a witness on behalf of respondents, being first duly sworn, testified as follows:

Q. You say, Mr. Karlson, that you think that land is worth $275.00 an acre? A. Yes.

Q. How do you arrive at that figure, Mr. Karlson?

A. We have employed engineers and also have had an organization formed in order to keep in contact with the valuations.

Q. And you were going by the advice of those people you employed? A. Yes.

Q. You do not profess to know anything yourself about what the value of that land is, do you?

A. Absolutely not.

Mr. Harries: We move that the testimony of the witness as to the value of the property in question be stricken.

The Court: It may be stricken.

Mr. Harries: That is all.

By Mr. Lewis:

Q. Mr. Karlson, when you say that you have no opinion of your own as to the value of the lands, just what do you mean?

A. Only that I am not in shape to figure out the value of a proposition of that sort. All I can go by is what our counsel and the engineers have to say—the advice given.

* * * * * * *

Q. Now the three forties which are in.....the southwest corner of your tract, you acquired from Alfred Green? A. Yes.

Q. When did you buy that land from him, in 1921?

A. 1921, yes.

Q. And what did you pay Mr. Green for it?

Mr. Lewis: Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination.

The Court: Objection overruled.

Mr. Lewis: Exception.

Mr. Harries: You may go ahead and answer that.

A. I think it was $175.00.

Q. For the three forties? A. Yes.
Q. $175.00? A. Yes.

Mr. Harries: That is all.

132 Redirect Examination.

(Added at the request of Respondent-Appellant's Counsel)

By Mr. Lewis:

Q. Mr. Karlson is this man that counsel has been inquiring about, Mr. Green, any relation of yours?
A. Yes.
Q. What is the relationship between you and him?
A. He is my brother-in-law.
Q. You may state whether your brother-in-law was owing you money, and had been for some time, before you took over this land from him? A. Yes, he had.
Q. Where was your brother-in-law at the time and shortly before the time that this conveyance was made to you?
A. He was working in North Dakota, on a farm.
Q. Had he been spending any time at home and attending to affairs at home at that time?
A. Not at that time.
Q. Did he have any means of paying you back the money that he owed you, except by conveying this land to you?
A. Not at that time.
Q. As I understand you then, he simply turned over the land to you in payment of his debts? A. Yes.
Q. And went back to North Dakota?
A. Yes.
Q. Now, some time after that, after the boy became somewhat older, do you know whether he himself bought any of this low land below contour 1064?
A. Yes, he did.
Q. And is the tract he bought substantially all below 1064?
A. I can't say as to that. A big share of it, I think, is below.
Q. And has he been living on that land or doing anything with it?
A. No, he has not.

133 Respondents next offered in evidence Respondents' Exhibit 5, which was an executor's deed in the usual form by R. M. Skinner, Executor, to W. E. McGuire, dated February 21, 1930, the portion of which is material here.

"Reserving however, to the estate of Alonzo Wheeler, all claims which it now has against the United States of America, as a result of condemnation proceedings commenced by said Government in obtaining certain grants of easement to lands bordering on Lake of the Woods, in Minnesota.

Respondents next offered in evidence Respondents' Exhibit 6, said exhibit being a warranty deed in the usual form, by Anna McCagherty, a widow, to Lenus Landby, dated May 26, 1924, the portion of which here being material:

"It is hereby agreed and understood by and between the parties hereto that said party of the first part reserves to herself and her heirs and assigns, an undivided one-half interest in and to any and all damages to said land that have or may have accrued, or may be assessed on account of the high water of the Lake of the Woods, and which matter of damages has been under the consideration of an International Joint Commission of the United States and Dominion of Canada."

Respondents next offered in evidence Respondents' Exhibit 7, said exhibit being a warranty deed in the usual form, by Frank Decker, to Albertina Franson, dated August 27th, 1928, the portion of which here material being:

"Reserving flowage easements as provided by the treaty between United States and Great Britain, Feb. 24, 1925."

Respondents next offered in evidence Respondents' Exhibit 8, said exhibit being a quit claim deed in the usual form, by Russell J. Kidder to John F. Kidder, dated Nov. 19, 1930, the portion of which here material being:

"The Grantor herein reserves to himself, his heirs, executors, administrators and assigns all claims for past damages due to artificial obstruction in the outlets of Lake of the Woods, also all claims for damages arising by virtue of the flowage easement that the United States is seeking to acquire, by reason of the raising of the level of the Lake of the Woods, and affecting said land."

Respondents next offered in evidence Respondents' Exhibit 9, said exhibit being a warranty deed in the usual form,

by Ole S. Swanson to Emma Smith, dated January 2, 1926, the portion of which here material being:

134 "Said parties of the first part retain to themselves, their heirs and assigns, all rights and claims for damages which may be paid by the United States Government and the Dominion of Canada on account of high water on Lake of the Woods, arising prior to September 28th, 1920."

Respondents next offered in evidence Respondents' Exhibit 10, said exhibit being a warranty deed in the usual form, by Wm. H. Ringling to Ole Meland, dated October 6, 1927, the portion of which here material being:

"Said parties of the first part do hereby expressly reserve to themselves, their heirs and assigns any and all claims for damages that may have heretofore accrued to said land, or that may hereafter accrue, either for flowage easements or otherwise, on account of the fluctuation of the water levels of Lake of the Woods, the regulation of which has been established by a Treaty entered into by the Governments of the Dominion of Canada and the United States and dated on or about February 24, 1925."

Respondents next offered in evidence Respondents' Exhibit 11, said exhibit being a warranty deed in the usual form, by Clair A. Lockrem to L. S. Darbyshire, dated 16th day of March, 1928, the portion of which here material being:

"Excepting and reserving to Clair A. Lockrem, his heirs and assigns, a flowage easement to elevation 1064 sea level datum upon said lands, and any or all awards as may hereinafter be made under the Lake of the Woods Act, approved May 22nd, 1925, for flowage easement to elevation 1064, or for such flowage easement as may be acquired under any amendatory act."

Mr. Harries: If the Court please, the Government objects to the admission of Respondents' Exhibit 7 and 11, on the ground that the same are incompetent, irrelevant and immaterial, and that no proper foundation has been laid therefor. I might call to the attention of the Court the fact that these instruments both purport to have been executed in 1928, after the effective date of the treaty under which the lands were overflowed. And any rights which were reserved

by the parties in opposition to the rights of the Government under that treaty, would, of course, be void.
135 And as to Respondents' Exhibit 6, the Government objects upon the same grounds as interposed to Exhibit 7 and 11, and upon the further ground that the matters therein referred to are damages sustained in the past, and have nothing to do with the flowage easement involved in this proceeding.

The Court: The objection will be sustained.

Mr. Lewis: Exception.

* * * * * *

Mr. Harries: If the Court please, the Government objects to the reception of Respondents' Exhibit 5, on the ground that it is incompetent, irrelevant and immaterial, and without proper foundation, and not within the issues before the court.

Respondents' Exhibit 8 is objected to on the same grounds, and on the further ground that the instrument executed November 21, 1930,—or I mean the instrument acknowledged on November 19, 1930, refers to claims for damages which the owner, or the grantor of that property, may have sustained.

Respondents' Exhibit 10 is objected to upon the same grounds as Exhibit 5 and 8, the last two exhibits, and on the further ground that the reservation therein referred to has to do with damages sustained in the past, and not with the easement itself, with which we are here concerned.

Respondents' Exhibit 9 is objected to on the same grounds as before, and on the further ground that it relates to claims for damages arising prior to September 28, 1920, with which we are not here concerned.

The Court: Well, what is it that you claim, Mr. Lewis, for this executor's deed? I think the objection to all the others will be sustained, but I do not exactly understand
136 what the purpose of this exhibit is. Does that make any reservation?

Mr. Lewis: I think they do, your Honor.

The Court: I did not look at it carefully enough.

Mr. Lewis: It may be that I have gotten an instrument into the files that does not, but I thought it made reservations.

The Court: Perhaps that is only the description of the property.

Mr. Lewis: Yes.

The Court: Then I will sustain the objection.

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137 Respondents thereupon offered in evidence Respondents' Exhibit 1, the same being application of St. John River Power Company to the International Joint Commission, and the order of the commission thereon, the material portions of said application and order being as follows:

"Application

To the Honorable the International Joint Commission:

Application made by Saint John River Power Company (Hereinafter called the Applicant) for permission to construct and operate certain permanent works in and adjacent to the channel of the River Saint John in the Province of New Brunswick at a point on or near the said River known as Grand Falls; respectfully showeth:

1. Status of the Applicant

The applicant is a corporation duly incorporated by special Act entitled "An Act to Incorporate Saint John River Power Company" passed by the legislative Assembly of the Province of New Brunswick during the session held in the present year, a copy of which, with the exception of Schedules, A, B, C, and D thereto, is set forth as Appendix I hereto.

* * * * * *

5. The Company may generate, purchase or otherwise acquire, sell, transmit and distribute electrical power and energy, and specifically, but without limiting the generality of the foregoing, the Company shall have full right and authority to develop hydro-electric power on the Saint John River at or near Grand Falls and for that purpose to divert and regulate the flow of said river and its tributaries both above and below its works, to such an extent and in such manner as it shall deem necessary, and also full right and authority to develop water storage and regulation thereof

138 in New Brunswick and beyond its borders and in interprovincial and international boundary rivers and streams, and to construct, maintain and operate transmission and distribution systems for such power any-

where in New Brunswick and points beyond its borders; provided, however, that the Company shall not export electrical power or energy beyond the limits of Canada except to the extent necessary to comply with any order of the International Joint Commission appointed pursuant to the Treaty between the United States of America and Great Britain dated the 11th day of January, 1909, unless and only to the extent that such export shall be approved by the Lieutenant-Governor-in-Council."

* * * * * * *

3. General Description of Project.

The applicant proposes to develop the natural water power at Grand Falls for the production of hydro-electric power.

The power development project, as now conceived and planned, will involve the construction of storage dams at various points within the tributary basin and the ultimate capacity of the development is contingent upon the ultimate extent to which the dependable flow of the Saint John River above Grand Falls may in the future be progressively increased, through the agency of artificial storage.

The power site of Grand Falls lies wholly within the Province of New Brunswick, about three miles below the point at which the line of the international boundary intersects the medial thread of the River Saint John, and all the works and structures incidental to the initial phases of the projects are in Canadian territory.

5. Effect of Proposed Works on International Waters.

The effect of the proposed works on international waters will be identically the same as the effect of the proposed works of the New Brunswick Electric Power Com-
139 pany would have been and is as follows:

By means of the main dam above described it is proposed to hold the upstream pondage at an operating level corresponding to high water marks at Grand Falls, but at no time above such elevation.

During the freshet period, the river will rise to high water stage through the ordinary natural process as heretofore, but during the low water period the effect of the dam at Grand Falls will be to still maintain the high water stage in the immediate vicinity of the dam, and pond the water back for about thirty-two miles at an elevation somewhat above low water mark, but at the same time always below high

water mark. The condition described is plainly indicated in the profile sheet, Plan No. III, submitted herewith.

* * * * * *

It will be seen that at the point where the ponded flow meets the international boundary, it is about sixteen feet above the natural minimum, and about four feet below the natural maximum water level. This relationship is seen to become gradually modified as the pondage extends upstream, until at Van Buren, Maine, the ponded level is only twelve feet above low water mark, and about fourteen feet below the natural maximum water level and finally reaches a point near St. Basil, New Brunswick, where the two levels coincide.

It is therefore evident that the only land adversely affected at any point within the ponded reach is the riparian strip between low and high water mark. The total area actually submerged at low stages of the river is eight hundred acres of which four hundred acres are in Canada and four hundred acres are in the State of Maine. This area includes, in addition to arable lands, a considerable acreage of sand and gravel bars exposed at periods of low discharge. The extent to which arable lands below high water mark are affected is more clearly shown on Plants No. IV to X inclusive, these being large scale plants covering successive portions of the ponded reach and upon which are shown the contours on both banks of the river, and a flow line in red showing the relative positions of the present permanent shore lines and the new shore lines which will result from the creation of the proposed pondage.

The Applicant is fully aware of the fact that the above described use of international waters is subject to a prior right in respect of navigation and other uses, and in connection with the same it is submitted that the proposed raising of the level in the ponded reach, together with the general improvement in flow regulation, through the agency of artificial storage, will jointly effect a more efficient dilution of sewage wastes, provide a purer and more abundant water supply at all stages of flow, and improve navigation not only in respect to ferries and other small craft on the ponded reach, but on all sections of the St. John River below the confluence of tributaries wherein storage dams may be located.

The progressive development of artificial storage will likewise in corresponding degree reduce flood damage and promote the interests of log driving by extending the season, improving the difficult reaches, and providing greatly improved facilities for booming and sorting.

Inasmuch as the project in question involves the placing of an obstruction in waters below the international boundary which will affect the level of waters above the boundary, and the flowing across the same, it is the opinion of the Applicant that your Honorable Commission may have jurisdiction in the premises, under the terms of Article IV of the Boundary Waters Treaty.

This Application is therefore respectfully submitted
141 for your consideration.

Petition. The applicant does now pray for such order, ruling or decision, authorizing and empowering the Applicant to proceed with the said works as may in the opinion of your Honorable Commission be required by the "Waterways Treaty Act" together with such provisos as may be deemed fitting in the premises.

All of which is respectfully submitted.

BROWN, MONTGOMERY &
McMICHAEL,
DAVIS, POLK, WARDELL,
GARDINER & REED,
Solicitors for Saint John River Power Co."

"Order.

Whereas the Saint John River Power Company (hereinafter called "The Applicant") has presented to and filed with this Commission plans of certain permanent works (hereinafter referred to as "the said works") for the development of hydro-electric power in and adjacent to the channel of the River St. John in the province of New Brunswick at a point in the said river known as Grand Falls and has applied for approval of the said works and authority to proceed with the construction of the same under the provisions of the Treaty between the United States and Great Britain relating to boundary waters and questions arising between the United States and Canada on the 11th day of January, 1909; and

Whereas, the power site of Grand Falls shown on said plans and described in said application lies wholly within the said Province of New Brunswick about three miles below the point at which the line of the international boundary intersects the medial thread of the River St. John, and it is proposed to create and maintain a ponded area in the said river for a distance of approximately thirty-two miles above

said Grand Falls, approximately twenty-nine miles of which ponded area is in that part of the river along which the international boundary between the United States and
142 the Dominion of Canada passes; and

Whereas, the present Application came on for hearing at the City of Washington in the District of Columbia on the 28th day of June, 1926, after due notice to all parties interested in both countries of the filing of said Application and of the time and place of said hearing; when evidence was adduced and counsel heard on behalf of all parties; and

Whereas, the Applicant has entered into an agreement with Madawaska Company (the successor in interest to St. John Lumber Company) covering the same subject matter as was covered in the agreement between the New Brunswick Electric Power Commission and St. John Lumber Company attached as Schedule A to the above mentioned order of this Commission dated the 22nd day of June, 1925, and a copy of said agreement has been communicated to this Commission, and contains provisions involving possible future references to this Commission; and

Whereas, the Applicant has entered into an agreement with Bangor and Aroostook Railroad Company and Van Buren Bridge Company covering the same subject matter as was covered in the agreement between the New Brunswick Electric Power Commission and said Companies attached as Schedule B to said order of this Commission and a copy of said agreement has been communicated to this Commission and contains provisions involving possible future reference to this Commission; and

Whereas, the Application has not yet effected a settlement with certain other owners of property which it is alleged will be taken or injuriously affected by said works, but has intimated that it expects and intends to do so; and

Whereas, conditional on this Order being granted, the agreement between Grand Falls Company, Limited, and the International Paper Company and the New Brunswick Electric Power Company, Commission attached as Schedule C to said Order of this Commission has been cancelled by
143 the parties thereto; and

Whereas, at the hearing on the above mentioned Application by the New Brunswick Electric Power Commission counsel for the United States claimed that the United States

is entitled to a certain percentage of the power to be developed at Grand Falls as aforesaid, and The Dominion of Canada and the Province of New Brunswick denied this right; and

* * * * * *

Whereas, the members of this Commission after having read the letters addressed to its Chairman from the Premier of New Brunswick and the Chairman of the New Brunswick Electric Power Commission and from the Grand Falls Company, Limited, and International Paper Company referred to in the Application in this matter, and also letters to the Chairmen of this Commission from the Attorney General of the State of Maine, from the Bangor and Aroostook Railroad Company, and Van Buren Bridge Company, from Madawaska Company, from the Canadian National Railways and from the Canadian Pacific Railway, and after having thus read the agreements above referred to, and after having heard the evidence adduced and counsel for the Applicant, the United States, the Bangor & Aroostook Railroad and Van Buren Bridge Company, the Canadian National Railways and the Canadian Pacific Railway, and after having considered the matters above recited, have determined that the said works should be approved and authority given for the construction thereof pursuant to said Treaty subject to the conditions hereinafter set forth.

1. This Commission Therefore Orders and Directs That the said plans be and the same are hereby approved, and the construction and operation of works in accordance therewith authorized under the provisions of said Treaty, upon and subject to the following conditions:

(1) That this Commission reserves to itself the right
144 to take jurisdiction in the instances mentioned in the above mentioned agreements of the Applicant with Bangor and Aroostook Railroad Company, and Van Buren Bridge Company, and with Madawaka Company.

(2) That the said Applicant make suitable and adequate provision, to the satisfaction of this Commission, for the protection and indemnity against injury of all other interests on either side of the boundary.

(3) That the said works shall have such discharge capacity and be so constructed as to permit the passage of water

at all flood stages in no less quantity than would pass down under natural conditions in the international section of the river, and whenever the flow of the river exceeds the discharge through the power house to such an extent as to cause the ponded level of the water surface immediately above the dam to rise above elevation 427.26 (mean sea level datum) being the operating level shown on sheet number 3 of said plans—the sluices and other works for the passage of water shall be so operated as to provide for the passage of the river flow until the water level at the dam falls to said elevation.

2. And This Commission Doth Hereby Reserve to the Applicant and to all parties having claims for injuries in respect of said works other than the parties to said agreement the right to apply for such further order, direction or action with reference to such claims as may deem proper.

3. And This Commission Also Orders and Directs, in accordance with Applicant's suggestion in that respect set out in Section 2 of its Application, that the Applicant execute and deliver to International Paper Company an agreement in substantially the form appearing as Schedule A hereto and covering the supply of 2,000 H. P. of energy for use in the United States, it being understood that this condition is being imposed in order that the position of the United States and of the State of Maine on the one hand, and that
145 of the Dominion of Canada and Province of New Brunswick on the other hand, shall be substantially the same under this Order as under the above mentioned order of this Commission dated the 22nd day of June, 1925. But should the above mentioned 2,000 H. P. cease to be available for use in the United States at any time for any reason this Commission reserves the right of the parties to reopen the question and ask for a decision on the contentions of the United States and the State of Maine, and of the Dominion of Canada and the Province of New Brunswick advanced at the hearings of this Commission on the above mentioned application of the New Brunswick Electric Power Commission, held at Van Buren, Maine, on the 25th day of March, 1925, and at Montreal on the 15th and 16th days of May and the 12th and 13th days of June, 1925. And until this Commission renders a decision on such questions the Applicant shall make available at least 2,000 H. P. for use in the United States upon receiving reasonable notice in writing requiring it so to do unless relieved by order of this Commission from so doing. Liberty is hereby reserved to the Applicant from time to

time and at any time to apply to this Commission for relief from said requirement.

4. And This Commission Doth Further Order and Declare that nothing in this Order contained, in the recitals or elsewhere, shall by implication or otherwise be construed or taken as an expression of opinion on the part of the Commission with reference to the contentions above recited or as a recognition in any way of the principles contended for by counsel for either country at the hearings above mentioned.

Dated at Washington, D. C. this 28th day of June, A. D. 1926.

C. D. CLARK,
C. A. MAGRATH,
FRED T. DUBOIS,
H. A. POWELL,
P. J. McCUMBER,
W. H. HEARST."

146. The Government objected to said offer on the grounds stated in connection with the foregoing offers to prove. The court sustained said objection, and respondents duly excepted.

Respondents next offered in evidence Respondents' Exhibit 32, the same being a volume containing the final arguments before the International Joint Commission the question of regulating the level of the waters of the Lake of the Woods, the material portions of which are as follows:

* * * * * * *

(By Hon. C. J. Rockwood, attorney appearing before the International Joint Commission.)

"The one thing it seems to me that this commission should do is to see that it does not do anything that will tie the hands of the next generation and limit the possibilities of this water power. Every inch of elevation that can be added, if it can be used once a year, equals in the neighborhood of $100,000 in value every inch. The addition of a foot, if it is utilizable, adds in the neighborhood of a million dollars, computing power at $10 per horse power. The value and the possibilities are simply beyond the conception of any of us, and the one thing most of all that should be in the minds of this commission and of everyone who acts with any responsibility toward

this development, is to see that nothing is done and nothing is permitted to be done that will tie the hands of the future."

* * * * * *

(By Isaac Campbell, K. C. representing the power interests of the City of Winnipeg).

* * * * * *

For that additional level and for the foot or two feet in height of contour, the lands falling within an addi-
147 tional contour of a foot and a half, we should pay, and we should pay in full, although the riparian owners may for several years out of 25 be able to make some use of that foot or 1½ feet. But if they are liable to have it flooded 1 year out of 25, or 3 years out of 25, we can not with very good grace, nor with justice, and, I think not within the law, object to paying them for the full value of the land; and in recommending that value, it seems to be that you are not limited to the strict market value, not only the 10 per cent spoken of today, but 20 or 25 per cent might be added.

* * * * * *

As to making the compensation, we should be willing to pay fairly and in that sense liberally for the land that is injured, and that would be either condemned or taken over or whatever would be the procedure that would be adopted.

Mr. Mignault: When you say "we" whom do you mean?

Mr. Campbell: The Canadian power interests, the Dominion Government, so far as they own the power, and those that are now allotted or in use; and I am speaking for the community of the city of Winnipeg that I think we ought to pay a fair share, our full share and that there is no objection to its being computed fairly, and liberally, not put at the exact market value of 10 per cent, but at 20 or 25 per cent, that could be with safety added to what would be the estimated market value. And, more than that, that value should, as soon as your report is acted upon, be paid, then; that is, be paid now, without waiting until the time comes when we will need to raise the water. We do not need to raise it now. We do not need any regulation now. My clients can get along if the Lake of the Woods were treated as now, and they probably will for 8 or 10 years be able to do so. But it is not desirable that neither the riparian owners or ourselves should be in doubt about the legel height of the water avail-
148 able. It is not fair [—] them and not fair to us, and I think we should pay the full amount of the compensa-

tion that should be charged against us,—pay it now, and, although interest would be running on the money it would be avoiding trouble and doubt and anxiety, which would be well worth the use of the money, although you would not have the use of the added amount of water."

* * * * * * *

(D. H. Laird, representing the Winnipeg Electric Railway Company and the Winnipeg River Power Company.)

"As power users, we desire that higher levels, and, as indicated by Mr. Campbell and Mr. Rockwood, the power users consider that adequate and full compensation should be made to the landowners for the land necessarily taken for that higher level; but the method of levying that compensation upon the power users, of course, is a purely domestic matter. If the power users in Canada get the benefit of it, I have no doubt that the Canadian authorities would see that they would pay it ultimately. We are vitally interested in the best use of those waters. We have invested now in the plant in Winnipeg millions of Dollars. The direct investment at the power plant is very large, $6,000,000 at the power plant alone, and then we have all the investment in Winnipeg systems there, all dependent upon this power. Then we have spent $60,000 in the development of the new site at Great Falls. That contemplates an expenditure of seven million or eight million dollars for the ultimate development of that site. Our interest is very, very great in the most advantageous uses of those waters."

The Government objected to said offer on the grounds stated in connection with the foregoing offers to prove. The court sustained said objection, and respondents duly excepted.

In connection with respondents offer of their Exhibit 32 the material portions of which are above quoted, respondents offered to prove that the arguments, and the facts
149 contained in the arguments, as set forth in said respondents Exhibit 32 were circulated among the property owners here in question, and the public generally in Lake of the Woods and Roseau Counties wherein said lands are situated; and that the facts contained in said arguments were known by the property owners and the public generally in said two Counties. That the Government objected to said offer, the Court sustained said objection, and respondents duly excepted.

That thereafter respondents offered in evidence Respondents Exhibit 33, being the brief of Hon. C. J. Rockwood, counsel for Minnesota & Ontario Power Company, and other allied companies, presented by him to the International Joint Commission on the question of regulating the water of the Lake of the Woods, the material portions of said brief being:

"Added Power. The river which flows out of the Lake of the Woods is a great source of power, and the lake without artificial improvement is a great benefit to the river as a producer of power; but I shall point out that the control of the lake and of the waters that flow into it have added or will add not less than 100,000 continuous horse powers of energy to that which could be produced without such control. Perhaps much more could be accomplished. I shall deal only with the minimum.

"Value Of Power. These 100,000 horse power are, except in the matter of intelligence, equal to the labor of not less than a million men. Their work is perpetual. They produce power at a fraction of the cost of power from other sources. They do not perish with the using.

I reproduce from Water Resources Paper No. 3, page 274 a table of comparative costs of power in the city of Winnipeg:

150 Table 42. Comparison of the Cost of Fuel Power in Winnipeg with Power from Pine Falls.

	Capital Cost Installed Complete	Per Horse Power Year Load Factor			Per Kilowatt Hour Load Factor		
		25%	50%	75%	25%	50%	75%
250 H. P.	$	$ ¢	$ ¢	$ ¢	$ ¢	$ ¢	$ ¢
Steam	22,500	60.00	100.00	134.00	3.64	3.06	2.73
Diesel Oil	30,000	37.00	58.00	78.00	2.28	1.77	1.59
Producer Gas	27,500	47.00	77.50	108.00	2.88	2.37	2.20
Hydro-electric							
Initial	6,000	15.00	15.35	15.70	0.66	0.57	0.54
Complete	6,000	13.30	13.70	14.00	0.60	0.51	0.48
500 H. P.							
Steam	42,500	52.50	87.50	115.00	3.22	2.68	2.32
Diesel Oil	55,000	35.50	55.50	75.50	2.18	1.70	1.54
Producer Gas	50,000	42.50	70.00	97.00	2.60	2.13	1.97
Hydro-electric							
Initial	12,000	15.00	15.35	15.70	0.66	0.57	0.54
Complete	12,000	13.30	13.70	14.10	0.60	0.51	0.48

151 "The Effort of Regulation.

* * * * * *

It is disclosed by the actual surveys reported in Water Resources Paper No. 3, pages 224, 234, 258, that any development of two power sites, Lower Seven Sisters and Upper Seven Sisters, is from a practical point of view dependent on complete regulation of flow. With complete regulation, the first of these has a capacity of 37,900 horse power with wheels of 75 per cent efficiency, and the second 29,600 horse power with wheels of the same efficiency, or an aggregate of 67,500. This power is wholly lost by absence of complete regulation.

Estimates of water power capacity are traditionally based upon 75 or 80 per cent wheel efficiency. It is safe now to depend upon 90 per cent. This change in basis of efficiency would add 2,857 horse power to the 22,860 and 13,500 to the 67,500 making respectively 25,717 and 81000 or an aggregate of 106,717 produced by further regulation."

* * * * * *

"Total Effect.

Taking all the items of gain into consideration, the total result of complete regulation may safely be estimated at not less than 115,000 horse power, and probably as high as 125,000 in addition to making present regulation lawful beyond question.

The Value of Regulation.

Using the smaller figure, 115,000 horse power, as the result of regulation, and the low estimate of ten dollars per annum at the value of a horse power, the result is $1,150,000 per annum, or interest at five per cent upon $23,000,000.

152 That ten dollars is not a high estimate of the value of a horse power, is shown by the comparison of costs of hydro electric and other sources of power found in Water Resources Paper No. 3, page 275, and that the actual development and use of this power in the not distant future is a practical certainty, is shown by the fact that over 85,000 horse power have been actually developed at Kenora, Keewatin, Piniwa and Point DuBois, and that except for the war, work would have been fairly well under way before now on the development of another 1000,000 horse power at the DuBonnet Falls site.

The prediction would have seemed fanciful if made twenty-five years ago that this actual development would have occurred or would have been considered within this period."

* * * * * *

"Water Power Property.

A water power property consists not only in the riparian ownership of land suitable for the construction of a dam. Equally necessary are other property rights, such as flowage rights.

* * * * * *

The land necessary for this is part of the water power property. The site for storage reservoir, although remote, is equally a part of the water power property.

* * * * * *

In the case of the Winnipeg River, the remotest and smallest reservoir site in the hills of the northeastern Minnesota, or across the line in Ontario, is as necessary to the full development of the water power property whose wheels are to be turned at DuBonnet Falls, as is the location for the
153 dam and power house itself. * * * Likewise of every intermediate reservoir, Lake of the Woods, Rainy Lake, Namakan and all the rest. From time immemorial American law, and doubtless also Canadian law, has permitted the acquisition by compulsory process of these collateral properties as an aid in the development of water power.

In the United States, where the federal constitution and every state constitution permits the exercise of the power of eminent domain for public purposes only, some of the states have so defined the term "public use" as to exclude ordinary manufacturing enterprises and limit the term to such uses as the public would have some direct participation in."

"What shall the maximum be?

Value of Stored Water.

The quantity of water found in a single foot in depth of water on the surface of the Lake of the Woods will create in its fall to Lake Winnipeg 39,480 horse power continuous for one year with wheels of 80 per cent efficiency, and 44,415 horse power with wheels of 90 per cent efficiency. The commercial value at $10 per horse power per annum is $394,800 in one case, and $444,150 in the other. The Capitalized value, if this use can be repeated once every year, is from eight to ten million dollars.

It seems to be assumed in the engineers' testimony, February, 1916, meeting, page 214, that at least one hundred billion cubic feet of storage will be created in Rainy Lake and above, and it is contemplated that one hundred fifty billion may be created. The commercial value of the flow of fifty billion in its fall to Lake Winnipeg would be from five hundred to five hundred fifty thousand dollars, and the
154 capitalized value, if it can be repeated once each year, will be from ten to twelve million dollars."

"Value in Future.

It is a moral certainty that the time will shortly come when this power will have twice the value that is now estimated. Using the cost of coal as basis, it has more than twice that value now. These values are so great and so certain of realization that any and all damages suggested, in the highest and wildest estimates, are puny in comparison.

As soon as the demand appears for power on the Nelson River, and it is sure to appear soon, the figures used above to express the results and values must be doubled and trebled. To hesitate in the expenditure of a few hundred thousand dollars, for the cost of flowage rights and protective works, would be nothing less than crime against succeeding generations."

The Government objected to said offer on the grounds stated in connection with the foregoing offers to prove. The court sustained said objection, and respondents duly excepted.

That in connection with the offer of Respondents' Exhibit 33 Respondents offered to prove that the facts and information set forth in Respondents' Exhibit 33 were circulated among the residents of Lake of the Woods and Roseau Counties, and were known by such respondent-residents and by the property owners generally in those counties,—to which offer the government objected on the grounds heretofore stated, the court sustained said objection, and respondents duly excepted.

Thereupon respondents offered in evidence Respondents' Exhibit 36, being an editorial in the Manitoba Free Press of the City of Winnipeg, under date of June 3, 1922, the material portions of which editorial are:

155 "To the Manitoba power plants on the Winnipeg River, present and prospective, it is vitally important that there should be a regular, dependable flow of water. Win-

nepeg's municipal power scheme, the Manitoba Power Company's hydro-electric enterprise, the Winnipeg Electric Railway Company, and all future power concerns would be directly affected if Mr. Backus were allowed to use the flow from the Lake of the Woods, as he proposes, or else to levy a toll, as he would be in a position to do, on the Manitoba power companies for allowing the flow which they required. Rates for light and power would have been forced up and the advantage which this city possesses with its exceedingly cheap power for industrial purposes would have been considerably discounted. But the "dependable flow" was not only desired by Manitoba, but was clearly by highly competent authorities to be the best system for Ontario also."

"Mr. Backus' interests last year fought against this retriction with all the resources at their command. They claimed that they could not properly carry on their proposed pulp industry at the Lake of the Woods if the "dependable flow" plan were adopted and they could not have, intermittently, the maximum flow". * * * *

"It is supposed that Premier Drury in re-introducing his bill thinks that he can secure enough support in the Legislature this time to carry it. If he does, the situation in regard to power development in the Lake of the Woods District will be definitely settled. Power development in Manitoba will also, as a result be able to go ahead without the menace of serious interference with the flow in the Winnipeg River, or of the necessity of paying tribute to Mr. Backus. Mr. Backus will be able to proceed with his enterprise, forgetting about the imaginary handicap to which he says he is being subjected. And Mr. Peter Heenan, M. L. A. and his constituents in Kenora will realize in time that they are not going to suffer as a result of the regulating of power development in the manner proposed, but that their town and district will benefit from the control and protection that is being provided."

The Government objected to said offer on the grounds stated in connection with the foregoing offers to prove. The Court sustained said objection, and respondents duly excepted.

The Government's objection was stated in the following terms (By Mr. Harries) We object to the exhibit and its reception in evidence on the ground that it is hearsay, incompetent, irrelevant and immaterial and no proper foundation has been laid for its introduction; and to the offer

with reference to the knowledge of the people in Roseau and Lake of the Woods Counties, of the contents of this editorial, we object on the ground that that is immaterial.

That in connection with respondents' offer of their said Exhibit 36, respondents offered to prove that said editorial, respondents' Exhibit 36, and the facts recited therein, were known and discussed by the people living in Lake of
156 the Woods and Roseau Counties. The Government objected to said offer of proof, the court sustained the said objection, and respondents duly excepted.

Respondents next proved by P. C. BULLARD and Respondents' Exhibit 58, being the annual report of the Chief of Engineers, U. S. Army for 1930, that the U. S. Government, up to and including 1930, has expended on account of the Lake of the Woods project, pursuant to the Treaty of 1925, and the Acts of Congress conformable thereto, the following sums:

All costs in connection with flowage easements	$127,697.19
Protective works and measures	179,865.67
Investigation relating to past damages	47,044.23
	$354,407.09

E. E. CORRY called as a witness on behalf of the Government testified, among other things, that he was charged with the duty and responsibility of obtaining the flowage easements in question. On cross-examination Mr. Corry testified that in connection with his duties in acquiring said easement that he mailed, on behalf of the government, letters to 97 property owners, who owned land below contour 1064 on which the government desired to acquire a flowage easement. That those letters contained offers to the said property owners of the amount which the government was willing to pay for said flowage easement. That the said offers which the government submitted to said property owners were based on "general land values in that territory."

"Q. And I will ask you whether you submitted any offers to any of these property owners that included any element for reservoir value, or flowage value of those lands?
157 A. Any specific mention, you mean?
Q. Well, we will take it that way, if you wish, and then take the other half later.

A. No, we were not buying a reservoir. We were buying an easement on the land, based upon the market value of the land as we were able to determine it."

* * * *

Mr. Corry further testified that he was unable to reach some of the 97 property owners to whom he mailed offers, and that out of the 97 offers submitted only seven of the property owners made conveyances to the government.

Referring to lands below contour 1064 Mr. Corry further testified on cross-examination:

"Q. You also stated that the government had withdrawn those lands from entries some time along in there. When were they withdrawn?

A. Early in 1928, if I remember correctly.

* * * *

"Q. So that you found there was a greater demand, or a greater number of entries made for lands below 1064 than were being made for lands above 1064?

A. We did not investigate as to lands above 1064.

Q. But you did find that there was a rather increased interest in the lands below 1064?

A. Yes. There seemed to have been quite considerable activity there for some years before that time.

Q. You say for some years before that time?

A. Yes, sir.

Q. For how long before 1928 did you find that there had been some increased interest in the lands below 1064, and that that interest was reflected in the number of applications by homesteaders for those lands?

A. We found the greatest number of entries in any one year, except possibly the first year or two that those
158 lands were opened for settlement in 1898 and 1899, were in the years 1919 or 1920, shortly after the International Joint Commission had filed its report.

Respondents then rested.

Prior to the introduction of respondents' evidence and in opposition to respondents' offer to prove, the government objected to the introduction of any evidence and demurred to such evidence on the grounds set forth in the foregoing pages. The said demurrer having been overruled by the court, the government then proceeded in support of its contention to introduce evidence.

Mr. E. E. Corry was called as a witness on behalf of the government, as set forth in the amendments to the bill of exception proposed by the government.

The Government called ADOLPH F. MEYER, who testified that there are approximately 31,354 acres within the boundary of the State of Minnesota affected by said easement, and a total of 46,727 acres in the Dominion of Canada affected by said easement.

The Government in support of its objection and demurrer to the evidence and offers presented to the court on behalf of respondents, introduced in evidence Chapt. 24 of the 2nd Session, 50th Congress, approved January 14, 1889, and contained in 25 Statutes, [Capt.] 642, the same being entitled "An Act for the Relief and Civilization of the Chippewa Indians in Minnesota," and in that connection also introduced in evidence the treaty entered into between the U. S. Government and the Chippewa Indians, same being Government's Exhibit 9 and 10, it being the contention of the government that according to the terms of said treaty and said Act of Congress, the government has a right to flood
159 respondents' lands without the payment of compensation therefor. The government's contention and demurrer on that proposition was overruled by the trial court.

There was further evidence introduced by the government on the value of respondents' lands for agricultural purposes, and some evidence was introduced on that point by respondents, but that evidence is not material in the determination of the questions involved on this appeal.

On the close of the testimony respondents' requested the court to give the following written instructions to the jury:

(Instructions to Jury Requested by Respondents and Overruling Thereof.)

1. The jury is instructed to return a verdict in favor of each respondent for the fair value of the flowage easement which petitioner is seeking to acquire on each of said respondents' lands, as disclosed by the evidence.

2. In computing the amount of compensation to which each respondent is entitled, you should award him such an amount as will justly compensate him for his property taken by petition in these condemnation proceedings. You should take into consideration all of the uses for which respond-

ents' said lands and property are suitable and to which you find from the evidence that his property was adapted on May 4th, 1929, and determine which of said uses is the most valuable and base your award thereon.

3. You are instructed that each respondent is entitled to your verdict for such an amount as will justly represent the fair value of his property for the most valuable use to which it was plainly adaptable and available on May 4th, 1929.

4. You are instructed that you should award each respondent such an amount as will justly compensate him for the fair value for flowage and storage purposes of so much of his property as petitioner seeks to acquire by these proceedings, provided you find that his property was suitable for flowage purposes and that such was its most valuable use."

That the government objected to each of said requested instructions, that the court sustained the objection, and refused to give the same, except as contained in the general charge, and that respondents duly excepted to each of said refusals of the court.

That thereafter the court instructed the jury as follows:

Charge to the Jury by the Court.

The Court: Members of the jury: In 1925 the United States and Canada entered into a treaty for the purpose of regulating the lake levels of the Lake of the Woods. The Lake of the Woods as you know constitutes international waters, and lies on the northern boundary of this state. The testimony shows that contains some 1500 square miles of surface, and that the shore lines of the main shore extend for some 1500 miles. It appears that for more than thirty years, the waters of the lake have been controlled by dams at the outlet of the lake, and that the water has been maintained some three feet on an average above its natural level. Some of those interested in the lake, wanted the water to be maintained at a high level, while other interests wanted a low level. The International Joint Commission undertook to determine the stage or stages of water in that lake which would produce the greatest aggregate benefits for all interests, power, navigation and fisheries. That Commission reached the conclusion that the waters of the lake should be controlled so that the ordinary high water levels should be

at 1061.25 feet above sea level, and that the maximum high water level should be 1062.5.

The Commission estimated that when the water stood at 1062.5, the shore lands would be adversely affected up to level 1064, by seepage and wind and wave action, and that that should be taken into consideration in acquiring the right to flow the shore lands. The treaty put into force the recommendations of the Commission, and the United States, pursuant to the treaty, proceeded to acquire the rights against the shore lands on the American side of the lake, to maintain the lake levels as provided for in the treaty. The proceeding to impose this easement of flowage, or the
162 right to flow the land, was commenced some time ago. Commissioners or appraisers were appointed by this Court, to fix the amount of damages to which each owner of shore lands was entitled. The Commissioners made their awards which in some cases were unsatisfactory to the owners, and in other cases unsatisfactory to both, and in still other cases unsatisfactory to the Government. Appeals have been taken from the awards of damages in a number of cases, and as a result, you are here to determine for us what compensation shall be paid by the Government to the property owners for the lands involved in this case.

The Government has a right to take private property for a public use upon payment of just compensation. Just compensation is to be measured by the loss caused to the owners by reason of the taking. The compensation must be the full equivalent in money of what is taken. It must be based upon the most favorable use for which the land is adaptable. The owner is entitled to be placed in as good a position from a money standpoint, as he would have been in had his property not been taken. It is what the owner loses, and not what the Government or anyone else gains, which measures what the Government must pay.

In this case the Government is not taking the lands themselves, but is taking an easement upon them; that is, it is taking the right to flow them in accordance with the levels provided by the treaty.

There is no doubt, and no question, but that the maintenance of the treaty levels will damage these lands here involved to some extent, but the amount of damage to each tract is in dispute. Neither counsel nor I can tell you what the amount of damage is. We no doubt all have our opinions as to what it is, but our opinions are not binding on anyone. It is for you to tell us what the damages are, basing your

judgment on the evidence and the law as I give it
163 to you. It is my duty to tell you, as accurately as I can, what the law is as it applies to this situation, and it is your duty to say what, under the evidence and the law, the Government is required to pay to each of the property owners.

The rule is that the owner of land on the shore of such a lake as this has title to his land to the natural low water mark of the lake. His riparian rights, that is, his shore rights, or his rights to the use of the shore and the waters of the lake extend to the ordinary high water mark of the lake under natural conditions. The ordinary high water mark is the highest level of the ordinary natural lake bed, the level at which lands would not be usually used for agriculture because of the waters of the lake standing upon them for such long periods of time as to prevent their being so used.

Mr. Meyer, who was one of the consulting engineers for the International Joint Commission, has testified in this case that it was determined by him and his assistants that the natural ordinary high water level of the Lake of the Woods was at level 1059, that representing the level at which the water would have stood during 20 per cent of the growing season, and it is understood that for the purpose of this case, that that will be considered to be the ordinary high water level of this lake in a state of nature. It is important to keep that in mind, because it is the law that the Government may, for public purposes, maintain the levels of any lake such as this, up to the ordinary high water mark, without paying any compensation to the owners of shore lands; in other words, the Government may use the entire ordinary lake bed for the storage of water, without paying anything to anybody therefor. It is only when the Government pushes or raises
the lake above its ordinary bed, that it becomes liable
164 in damages, and then it becomes liable only for such damages as are occasioned by maintaining the levels at these stages above the ordinary high water level. The owner of the shore lands is only entitled to damages, as I have stated, when the lake is raised above its ordinary high water level; so in this case, whatever damages will be done to these lands by maintaining lake levels up to 1059, could not be charged to the Government, and it is only for damages that will be occasioned by raising the water above 1059, for which the Government is responsible.

As I have stated before, the levels fixed by the treaty are these; the ordinary high water level is 1061.25; the maximum

high water level is 1062.5; and the testimony is that the effect of seepage and wave action and wind action will adversely affect the lands when the water is at 1062.5, up to 1064, and the Government desires to have the right to flow these lands up to the treaty level, and desires to pay the owners of the property the damages they are entitled to, in consideration for the acquisition by the Government of that right.

Mr. Meyer, who as I stated before, the engineer for the International Joint Commission, and who testified here before you, gave it as his opinion that for 50 per cent of the time under the treaty, the average water levels will be about 1060, and that for the balance of the time they will be somewhat higher than that, but will be at 1061 or 1061.25, 25 per cent of the time; and occasionally they will reach the level of 1062.5 during seasons of high water or excessive rainfall.

It must be remembered that the levels are not under the control of private interests, but are under control of Governmental authority, and that we must assume that the levels will be maintained as provided for in the treaty, and that all the Government is acquiring here, or asking for, is the right to maintain those levels.

165 It is not necessary for me, and it would serve no useful purpose, to attempt to review the evidence which has been presented before you. You have the maps showing the locations of these lands, and the vegetation or timber which is growing upon them. The maps show the contours and they show to what extent the lands will be flooded if the waters are maintained at different levels. You have also your notes of the testimony of the various expert witnesses who have testified as to values, and counsel have explained to you the contentions of the Government and the contentions of the property owners.

The first question for you to determine with reference to each piece of property involved in this proceeding is this; what was the fair market value of this property under natural conditions on May 4, 1929 at the time the easement was imposed, taking into consideration the right of the Government to maintain the levels of the lake up to level 1059. The next question is, what was the fair market value of this same property on May 5th, with the easement imposed upon it. By deducting the value of the property after the easement was imposed, from its value before the easement was im-

posed, you reach the amount of damage, the amount which the Government ought to pay.

You have nothing to do in this case with past damages. That question is not to be determined in this proceeding. The fair market value of a piece of property is the amount which a person who was willing but was not compelled to sell, would receive from a buyer who was willing but not compelled to buy. Another way of putting it is, fair market value is the sum that would in all probability result from fair negotiations between an owner who is willing to sell, and a purchaser who desires to buy.

In computing the fair market value, both before and after the imposition of the easement, you will take into con-
166 sideration all of the uses for which the property was available on May 4, 1929, and May 5th, 1939, and determine what use it was most valuable for, and base your award thereon; but you will not make an award based on any claim for reservoir value. I have held that under the law the value of these lands could not be based upon the use of the lake and its shores for reservoir purposes. It is, as I understand it, conceded that the only other use for which these lands are suited, with the exception perhaps of Mr. Olson's tract, is for agricultural purposes, or purposes relating to agriculture, so that it is for those purposes that you are to value these lands.

It may be that Mr. Olson's property has also a use for fishing purposes, and if it has, you will add to the value which it might have for agricultural purposes, any added value which might accrue to it, because of its usefulness as a fishing station.

Now there is nothing in these cases to excite either sympathy or prejudice. As you understand, at the outset of this case perhaps the most controverted question was the question as to whether in determining the value of these lands, any added value could be accredited them because of the fact that they formed the boundaries or shores of what would be a very large reservoir, which would be used in part for the benefit of power companies on the Winnipeg River. I have held that as a matter of law, that question does not come into this case under all of the circumstances, so that you have absolutely nothing to do with it, and will not consider it in any way in your deliberations. If I am wrong in the position I have taken, I am subject to correction by a higher court, but the difficulty with you is, that your

conclusions are going to be binding upon all of us, so do not let yourselves be influenced in any way by any inclinations or feelings of sympathy, prejudice or passion.

167 Consider this question as involving nothing except these particular lands, and ask yourselves what under the evidence was the fair value, the fair market value of each piece of property on May 4th, without the easement upon it, and taking into consideration the right of the Government to use the ordinary natural lake bed up to level 1059 for navigation purposes. Then ask yourselves what the fair market value of these different tracts was after the imposition of the easement, and solve the problem just as you would any problem of mathematics, or anything else, without regard to any personalities, or the fact that the property owners are on one side of the controversy and the United States Government on the other side."

So far as we are concerned, we must assume that the property owners believe they are justified in their contentions, and that the Government believes it is justified in its contentions, and we must treat them both with absolute fairness. The property owners ought to receive every dollar that they are entitled to receive, and on the other hand they ought not to receive a dollar more than they are entitled to. The Government ought to pay every dollar it owes them, but it ought not to pay a dollar more than it owes them.

Now you are the sole and exclusive judges of the facts in this case. The facts you will determine from the evidence which you have heard here in Court, and from nothing else, and in reaching your conclusions you will rely upon your own recollections of what the evidence is. You are also the judges of the credibility of the witnesses, and the weight of the evidence; that is, it is for you to say what witnesses have told the truth upon the witness stand, and how convincing the testimony of each witness is. In doing that you will take into consideration the appearance of the witnesses, the manner in which they gave their testimony, the opportun-
168 ities that they have had to know the things about which they testified, the reasonableness or unreasonableness of the testimony which they have given, and any interest which they may have in the outcome of this case. If you believe that any witness has wilfully testified falsely to any material fact, you may in your discretion entirely disregard the testimony of that witness except insofar as it may be corroborated or supported by any credible evidence in the case. In determining or in passing upon the weight of the evi-

dence given to you by the expert witnesses who testified as to values, take into consideration their appearance also, the manner of men that they appear to be, the experience that they have had, the reasons which they were able to give you for the conclusions which they expressed. The purpose of expert testimony in all cases is to assist the jury in arriving at a correct conclusion. You are not bound in any way by the testimony of any of these experts. You will follow their testimony no doubt so far as it accords with your own judgment, if it is shown by the evidence to be the true value of these lands; but after all, what we are asking you for, is your own best judgment as to what, under the law and the evidence, constitutes the damage done to these lands by the taking of the easement in question.

When you go to your jury room, select one of your members as foreman, and let him preside over your deliberations. You will return a verdict of course as to each separate tract, and the verdict will read in this way: "We the jury in the above entitled cause, find that the damages to which the respondents are entitled are as follows;" then the name of the respondent or property owner, and the number or numbers of the easement, and then a dollar sign. After the dollar sign you will put the amount of damages which you will find that that particular property owner is entitled to be-
169 cause of the imposition of the easement upon the tract which he owns.

Mr. Lewis: Respondents take exception to the Court's refusal to grant Respondents' request number 1 for instructions to the jury; respondents except to the refusal of the court to grant respondents' request number 2 for instructions to the jury; respondents except to the court's refusal to grant respondents' third request for instructions to the jury; respondents except to the court's refusal to grant their fourth request for instructions to the jury; respondents except to that portion of the court's charge, wherein the court instructed the jury in substance that the jury is not permitted to consider the value of respondents' lands for flowage or reservoir purposes, and that they are to consider only the value of said lands for agricultural purposes, with the exception of Elias Olson's property.

The Court: As I understand, you are not claiming that except for reservoir purposes, the lands have any greater value for any other use than agriculture?

Mr. Lewis: That is right. The purpose of the exception is simply to save the right of the respondents on the issue of

reservoir and storage purposes. I take it that is a sufficiently comprehensive exception to that portion of the charge?

The Court: Yes. The record may show that, so far as I am concerned, and that that calls my attention to the exact portions of the charge which are objected to by the respondents, and which were those portions which directed the jury to eliminate from consideration any question of the value of these lands for power or reservoir purposes.

* * * * *

Thereafter the jury retired, with an officer, for deliberation on its verdicts.

170 (Jury returns to court room for further instructions.)

The Court: Now, I understand that the Jury are having some difficulty in agreeing upon a verdict in these cases. I think, perhaps, it might help you a little bit if I told you that the last thing in the world that the Government wants in these cases, or that the property owners want, is a disagreement. I think, as I told you before, that you understand that one of the most important and perhaps the principal question in these cases is a question of law that I decided, as to whether the evidence of reservoir values could be introduced in these cases; and I held that it could not be introduced, and the record has been made here for the purpose of taking that question to the Court of Appeals, and that is a very important question to be determined in these cases, since it will affect a great many other cases.

Now, the question of the value of this land is also an important question, and it ought to be determined accurately, and I am not in any way trying to coerce you in surrendering your own opinions about it, or to change your minds with reference to it. And while that is an important question, it is very, very important that you reach an agreement as to the value of these lands, one that will fairly represent the judgment of the Jury as to what the Government should fairly pay, leaving out the question of reservoir values. And I merely suggest that you go over the matter that you were in dispute about calmly and carefully, and that those who happen to be in the minority will reason with the majority, in respect to the opinions that they have reached, and see if you cannot reach an accord in those opinions, so that we may have a verdict, and so that the parties who are interested in the question of law may be able to get all those questions determined on the appeal.

171 (Verdict and Judgment as to Elias A. Olson, February 13, 1931.)

(A) Elias A. Olson.

The Jury in the above entitled action is returned into Court and being called, all being present, they do render their verdict wherein by their foreman they do say:

"We, the jury in the above entitled cause find that the damages to which the respondent is entitled are as follows:

Elias A. Olson, Easement No. 147 $490.00 Four Hundred ninety and no/100s Dollars.

Dated this 13th day of February, 1931.

C. D. OLSON, Foreman."

Wherefore, in accordance with said verdict, it is by the Court

Considered, Ordered and Adjudged that the respondent herein, Elias A. Olson, do have and recover of and from the petitioner herein, The United States of America, said sum of $490.00.

It is further ordered that a stay of forty-two days from this date of all proceedings, excepting the entry of judgment be and the same hereby is granted said parties, within which time they may make a motion for a new trial or take such steps in the premises as they may be advised.

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172 (Verdict and Judgment as to Randor G. Karlson, February 13, 1931.)

(B) Randor G. Karlson

The Jury in the above entitled action is returned into Court and being called, all being present, they do render their verdict wherein by their foreman they do say:

"We, the jury in the above entitled cause find that the damages to which the respondent is entitled are as follows:

Randor G. Karlson, Easement 86-87 $880.00
Eight hundred eighty and no/100s Dollars

Dated this 13th day of February, 1931.

C. D. OLSON, Foreman."

Wherefore, in accordance with said verdict, it is by the Court

Considered, Ordered and Adjudged that the respondent herein, Randor G. Karlson, do have and recover of and from the petitioner herein, The United States of America, said sum of $880.00.

It is further ordered that a stay of forty-two days from this date of all proceedings, excepting the entry of judgment be and the same hereby is granted said parties, within which time they may make a motion for a new trial or take such steps in the premises as they may be advised.

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173 (Verdict and Judgment as to Harry Brewster, February 13, 1931.)

(C) Harry Brewster

The Jury in the above entitled action is returned into Court and being called, all being present, they do render their verdict wherein by their foreman they do say:

"We, the jury in the above entitled cause find that the damages to which the respondent is entitled are as follows:

Harry Brewster, Easement 247, 248-252 $900.00
Nine Hundred and no/100s Dollars

Dated this 13th day of February, 1931.

C. D. OLSON, Foreman"

Wherefore, in accordance with said verdict, it is by the Court

Considered, Ordered and Adjudged that the respondent herein, Harry Brewster, do have and recover of and from the petitioner herein, The United States of America, said sum of $900.00.

It is further ordered that a stay of forty-two days from this date of all proceedings, excepting the entry of judgment be and the same hereby is granted said parties, within which time they may make a motion for a new trial or take such steps in the premises as they may be advised.

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174 (Approval of Bill of Exceptions by District Judge.)

I, the undersigned, Judge of the above named court who tried the above entitled actions, do hereby sign, settle and allow the foregoing bill of exceptions as amended by order as containing an accurate statement and recitation of

the evidence, offers to prove, exhibits and excerpts from exhibits, demurrer, objections, rulings of the court, exceptions, request for instructions to the jury, the instructions to the jury, and all proceedings recited therein, and I do hereby certify that said bill of exceptions accurately sets forth so much of the evidence, offers to prove, record and proceedings as are necessary to the consideration and determination of the issues and questions involved on the appeal in said actions.

Dated at St. Paul, Minn., this 30th day of July, 1931.

By the Court:

JOHN B. SANBORN,
U. S. District Judge.

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175 Amendments of Bill of Exceptions.

Referred to in Paragraph Number 1 of the Order of Court, Sanborn, J., dated July 30, 1931.

Allowing Amendments of Bill of Exceptions.

176 The Court: * * * It seems to me that the logical way to go at this thing is to prove and show all of the facts and circumstances in connection with the lake itself, upon which the respondents base their claim that the reservoir value enters into the,—that is, that the availability of this land for reservoir purposes enters into the question of value. Now, it seems to me that the question of whether it does enter into it will depend very largely upon the situation of the thing, that is, the size of the lake, the amount of water, and other things, and the miles of shore line, and the ownership of the lands, and doubtless a great many other factors which do not strike me now as very important from the start off. And why would not it be well for Mr. Meyer to go into that,—undoubtedly he knows the entire situation up there,—and have him testify as to the size of the lake, and the miles of shore line, and the drainage area; that may be important.

Mr. Harries: I should like to say to the Court, that if counsel for respondents is not prepared to present the necessary evidence of the actual conditions and circumstances of the Lake of the Woods, I will say that the Government is, and we would move the Court for leave to introduce that testimony out of order, so that the Court will be in a position to rule on the evidence which Mr. Lewis is trying to bring out. This motion was allowed, and

EDWIN E. CORRY, a witness called by the Government, being first duly sworn, testified as follows:

I was graduated from the Louisiana State University in June, 1902, in the Civil Engineering Course at that institution. Since that time I have been practicing engineering principally with the War Department engineers on river and harbor work. In May, 1927, I was appointed to carry out the work assigned by Congress to the War Department to secure flowage easements on the Lake of the Woods. First we had to determine just what lands were affected. We went onto the ground with an office located at Warroad, Minnesota, and determined the ownership of each and every parcel. We were able then to group the lands into tracts under various ownerships. In addition to the duty assigned
177 by the War Department of acquiring flowage easements by purchase or condemnation, I was charged with the determination of claims for damages previously sustained. This work concerned the very same land as those upon which an easement was to be acquired. The work required a careful study of the ownership of the lands in order to determine who should receive the damages.

(Government exhibit numbered 3, received in evidence showing the lands bordering on Lake of the Woods in Minnesota outlining in colors the different classes of ownership as follows: (on May 4, 1929, the date of the award of the Commissioners in this proceeding)

Yellow—privately owned lands on which flowage easement is to be acquired.

Black—Public lands owned by the United States.

Green—Lands owned by State of Minnesota subject to contract for sale to private parties.

Red—Land in possession of private parties by reason of homestead entries only.

The American shore line bordering immediately on Lake of the Woods comprised about 550 tracts. Not all of them touched the waters' edge, but all are within the flowage lines prescribed by the treaty, that is, below elevation 1064 sea level datum.

In addition to that there were some 300 tracts and small parcels located along the Rainy River and on streams tributary thereto, making approximately 850 or 860 tracts of land affected by the regulation of the levels of the lake. The number of tracts and the number of fee owners are not

equal: in some instances one person owns several tracts; the approximate number of property owners of lands within the flowage zone affected by these proceedings is 775 to 800 persons.

178 We measured the length of the shore line in the United States and Canada from maps which were part of the records of the District Engineer of the United States War Department at Duluth, Minnesota, and our findings in this regard were as follows:

Mainland shore line in the United States, 155 miles.

Island shore line within United States territory, 33 miles.

Total United States mainland shore line and island shore line, 188 miles.

On the Canadian side we found:

Mainland shore line 1280 miles.

Canadian islands 1625 miles.

Total Canadian shore line 2905 miles.

Shoreline including islands and mainland, United States and Canada, 3092 miles.

It was part of my official duty to ascertain the respective owners of the tracts affected. My findings in that regard were as follows:

Individual ownerships of land in the zone affected by the treaty regimen of levels, 775 to 800;

Mortgagees and other legal interests, 1200 to 1400,—(we have an actual count up to more than 1200.)

In many instances the owners could not be found. There have been a number of deaths of owners and probate proceedings have been instituted and carried through in some of these cases, but not in all. We have made a somewhat careful study of that situation in connection with the investigation and reports on claims for past damages.

In the discharge of official duties and in going upon the various lands on the American side, I learned the geographical distribution of persons owning or claiming to own an interest in the lands affected by the flowage easement sought in this proceeding, in order to determine whether such owners were within the State of Minnesota or where they might

be. In that connection I have now a memorandum
179 showing the information:

Persons living in the vicinity of the Lake, located generally on their own lands or in the counties in which these lands are located, 496.

Persons having an interest in these lands living elsewhere in the State of Minnesota, 186.

Persons living outside of the State of Minnesota, but in the United States, 102.

Those living in Canada, but having an interest in American lands, 21.

Persons who have died since they came into possession of these lands or since time of acquisition, 21.

Persons whose addresses are unknown; 401.

Total number of persons whose interests are shown in the records of the office of the District Engineer of the War Department, 1227.

In the discharge of the duties assigned to us under the Act of Congress which charged the War Department of the United States with the acquisition of flowage easements by purchase or condemnation, we secured conveyances of the right to overflow shore lands in accordance with the treaty in 7 cases.

Government exhibit 25 received in evidence. (The witness, continuing)—This is a tabulation based upon the statistical data contained in Gov't Ex's 18, 19 and 20, and compiled from records on file in the office of the District Engineer, at Duluth, Minnesota, of the U. S. War Department and other government records. The table shows homestead entries, patents, homestead entry cancellations, with totals showing the area of lands on the shores of Lake of the Woods in the United States included in these proceedings, both government and privately owned, for each year from 1897 to 1930. It also shows the lake stage for each year. Footnotes thereto show when these lands were opened for settlement, the date of the first hearing of the International Joint Commission, and date of filing of final report thereof and dates of withdrawal from homestead entry of remaining public lands.

Government exhibits 26 and 27 received in evidence,—certificate of Henry L. Stimson, Secretary of State, to executive withdrawal from homestead entry, of certain lands affected by flowage easement.

180 Government exhibits 28 to 54 inclusive, received in evidence.

By Mr. Harries: The government offers in evidence its exhibits bearing numbers 28 to 54, inclusive. They are offered severally and collectively. The exhibits are certified copies of deeds of tracts of lands in the area affected, and are offered for the purpose of showing that trading has been going forward in these lands during the period covered by the exhibits, namely, from 1910 to 1926, and the point that the government has in mind in this connection is to demonstrate that the value of this land is not limited purely to their intrinsic value, but that trading has been going on and exchanges made in the titles.

Mr. Lewis: They are objected to on the ground that they are incompetent, irrelevant and immaterial. I think it is fairly well settled that evidence of an isolated sale is not evidence of value, unless there is also shown all of the circumstances attending the sale, and I believe the usual rule is that the Court will not go into all that collateral inquiry. With reference to each one of these deeds, if they are admitted as evidence, it would be competent and proper for the respondents in each case to show the circumstances under which that particular deal was entered into.

The Court: Do they purport to be all the deeds of lands which have been made within a certain period?

Mr. Harries: No, I believe not. I don't think that all deeds of record during that period are here. The purpose is not to show the value, Your Honor.

The Court: Simply to show that there have been conveyances during this period, and they are not offered for the purpose of showing value?

Mr. Harries: No.

Mr. Lewis: Well, I have not seen them, so I don't know—counsel can probably tell us—whether they do recite value.

The Court: They are complete deeds, I suppose?

181 Mr. Harries: Yes, I believe that some of them do recite the consideration.

Mr. Lewis: Objected to further on the ground that they are hearsay and not the best evidence.

The Court: Well, I think I will receive them at this time and allow an exception, and it will not be necessary to read

them to the Jury, and if you wish to move to strike them out later on, before the case is finally submitted, you can do that, and we will consider the matter. That later respondents' motion to strike said exhibits was denied and exception noted.

Q. (by Mr. Harries) I now show you Government's Exhibit 25, and ask you to state what that is?

A. A tabulation showing the lake stages, homestead entries, and patents, tracts bordering on the Lake of the Woods in the affected zone, meaning by that, the territory with which we are concerned in these proceedings.

Q. It also shows the maximum and minimum lake stages in certain months for the open water, during the years from 1897 to 1929? A. Yes, sir.

Q. Where are these lake stages taken from—from where are the figures obtained?

A. They are taken from our gauge records or curves. The record is shown as a continuous curve, showing through all of these years.

Q. And they also show the natural levels during the same period of time? A. The computed natural levels.

Q. And then it shows the homestead entries on the tracts that are affected by the Lake of the Woods flowage, giving the number of tracts entered in each year, and the number of acres acquired by such entry? A. Yes, sir.

Q. And also indicates the cancellations of homestead entries?

A. Yes, both the numbers of tracts, and the acres; the total acreage under homestead entry in each year, and the number of acres below the 1064 contour entered in each year; and there is also an entry as to the tracts which

182 passed to private ownership by patent for each year, giving the number of tracts so passed, the acres, and the succession of acres each year, so as to show the total number of acres that were passed at the end of each year.

Q. Now, is that table simply a compilation of matters that are shown in Government's Exhibits 18, 19 and 20, the certificates of the Register of the Land Office at Cass Lake, except for the lake stages which you say are taken from your level curves in your office?

A. What was that question? You mean it does not include the Rainy River?

Q. Well, it does not include the Rainy River, and is limited to the lands in the Northwest Angle, and the south shore of the Lake of the Woods? A. Yes.

Q. In other words, it represents a tabulation of data contained in somewhat voluminous form, in the certificates of the Register of the Land Office? A. Yes, sir.

Q. Except for the lake [states], which are compiled from the basis you mentioned? A. Yes, sir.

Government's original exhibit numbered 24, received in evidence. This is the Atlas accompanying report of the Consulting Engineers to the International Joint Commission, relating to Lake of the Woods levels.

Mr. Harries: I will offer in evidence Government's Exhibit 25.

Mr. Lewis: Objected to as incompetent, irrelevant and immaterial, that it is hearsay, a conclusion, and no foundation laid, and that it is not the best evidence.

The Court: It will be received and exceptions allowed.

Q. Now you may state, Mr. Corry, the number of acres of land in the Angle, and on the north shores of the lake, owned by the United States in 1897, and 1898 and 1899? As shown by Government Exhibit 25?

Mr. Lewis: May the record show an objection to all this line of testimony, and an exception, on the ground that it is incompetent, irrelevant and immaterial, as calling for a conclusion, and as not the best evidence?

The Court: Yes, and exception allowed.

183 A. Taking into account all land, any part of which is in the tracts included in the three petitions, Lake of the Woods Petition, meaning the first, second and third petitions, which cover lands in the Northwest Angle, lands of the United States in the Northwest Angle—

Q. And owned by the United States, or do you mean lying in the United States? A. Lying in the United States.

Q. Oh.

A. On the south and west shores of the lake, there was a total of approximately fifty-five thousand acres in the year 1897.

Q. And in the year 1898?

A. In the year 1898 approximately fifty-one thousand acres; 1899, forty-nine thousand acres.

Q. The exhibit has been received in evidence and I don't think it is necessary to read all of the list. If you will come to 1920—I can line that out for you perhaps.

A. Sixteen thousand acres.

Q. And between 1920 and 1922 it ranged from sixteen thousand to fifteen thousand acres? A. Yes, sir.

Q. And from 1922 to 1928 it ranged from thirteen thousand down to eleven thousand acres roughly, and in round numbers?

A. It dropped to eleven thousand eight hundred acres in 1928.

Q. And in 1929 and 1930 I notice that it increased from eleven thousand up to thirteen thousand and fourteen thousand in those respective years. How do you explain that?

A. There were a great many cancellations.

Mr. Lewis: Is this material?

The Court: Well, he may answer.

Q. You say there were a great many cancellations of homestead entries?

A. Yes, there were a great many cancellations of homestead entries.

Q. So that the United States thus re-acquired approximately two thousand or three thousand acres during that period, by the cancellation of homestead entries?

A. Yes, sir.

Q. I notice some foot notes here. Are they part of the compilation made from the basis of the government exhibits referred to?

A. The first two footnotes relate to the use of opening the land for settlement in different locations. Lands on the south and west shores were opened for settlement October 3, 1898, and those in the Northwest Angle were opened for settlement on June 15, 1904.

184 Government Exhibits 28-54, inclusive, received in evidence. These exhibits are certified copies of deeds of lands within the area affected by this proceeding. These deeds were executed between 1910 and 1927. This atlas (Government's Exhibit 24) shows the governmental subdivision of lands within the zones of the easement herein sought and the legal descriptions in the deeds (Government's Exhibits 28-54, received in evidence) locate the lands, in which trading was going on within the area affected by the easement for a period of fifteen years before the execution of the treaty concerning the Lake of the Woods.

The following additional evidence was received in support of the Government's objection to the admission of evidence of reservoir values of respondents' lands:

Mr. Harries: In addition to the testimony heretofore offered, the Government offers as further foundation for its objection to the introduction of any evidence touching reservoir values on the Lake of The Woods margin, Government's Exhibit 9, which was presented in another connection, being the agreement of July 8, 1889, House of Representatives Executive Document No. 247, 51st Cong. 1st Sess., and Government's Exhibit 10, with certificate attached to it, and Government's Exhibit 11, map of the ceded territory from the Red Lake Band of Chippewa Indians, pursuant to the Act of Congress of January 14, 1889; Government's Exhibits 22 and 23, which are also maps of ceded territory; Government's Exhibits 12, 13 and 14, 14½, 15, 16 and 17, which are certified copies of homestead applications under the Chippewa Act of 1889. I might state, by the way, that the reporter in numbering exhibits, failed to number one, which has now been numbered as Government's Exhibit 14½. We also offer Government's Exhibits 18, 19 and 20, being certificates of the General land office at Cass Lake, showing the time of opening the land for homestead entry, and the time that entries were made.

The Court: They will be received.

185 Mr. Lewis: "Well, I suppose they are already in evidence, and he can use them for all purposes."

The Court: "Alright."

Objection and exception allowed.

The statutes, and exhibits previously introduced in evidence, and now presented as a further foundation for the Government's objection to the introduction of any evidence touching reservoir values on the margin of the Lake of the Woods, were laid before the Court by the following proceedings:

Mr. Harries: The United States objects to the introduction of any evidence and demurs to the introduction of any evidence in support of any claim for compensation for damages accruing from the overflow of any of the lands involved herein on account of the construction and maintenance of dams for the purpose of creating reservoirs in aid of navigation, and I should like just a few moments to designate to the Court the Acts of Congress and official documents which support this objection and demurrer.

Mr. Harries: The Acts of Congress which are brought to the attention of the Court, in support of the objection on the

part of the United States to the introduction of any evidence, and demurrer to any evidence in support of any compensation for any damages accruing for the overflowing of any of the lands involved herein on account of the construction and maintenance of dams for the purpose of creating reservoirs in aid of navigation may be very briefly set before the Court. The first item is this: Chapter 24 of Session 2 of the Fiftieth Congress, approved January 14, 1889, and contained in Twenty-five Statutes, six hundred forty-two, which was entitled an Act for the relief and civilization of the Chippewa Indians in Minnesota—I shall not read it all to the Court. It authorized the President to appoint three Commissioners to proceed to Minnesota and negotiate for cessions of all the Chippewa land in the State of Minnesota. Provision was made with reference to a survey of certain lands, and it was provided in section six of the Act, that the Agricultural lands shall be disposed of by the United States to actual settlers only under the provisions of the homestead law. Pursuant to the Act of January 14, 1889, the President appointed commissioners to negotiate with the Indians for the cession of the lands, and that Commission was headed by Henry M. Rice, and was known as the Rice Commission. The Commission made a report, which is contained in House of Representatives Document Number 247, of which we have a certified copy, and which now, for the purpose of this objection and demurrer, I should like to have marked as an exhibit.

186 (Government's Exhibits 9 and 10 marked for identification by the Reporter.)

Mr. Harries: The treaty, which was then made, is comparatively short and perhaps I can read that to the Court.

"The boundaries of the diminished reservation, from which allotments to the Red Lake Chippewa are to be made, are as follows:

"Commencing at Thief River at a point on the dividing line between Marshall and Polk Counties, as designated on a map published by Rand, McNally & Co., of Chicago, in 1888; thence easterly to a point on the northwesterly shore of Upper Red Lake; thence along the northern shore of said Lake to a point due north of a point 1 mile due east from eastern end of the Lower Red Lake; thence southwesterly to a point on Hay Creek 1 mile from its mouth; thence due south

to a point due east of a due westerly line which when extended will run between what is known as the most southerly sugar-bush on Red Lake road to White Earth, and north of what is called the "Big Marsh" to Clearwater River (said line being about 6 miles south of Red Lake); thence down Clearwater River to the southwesterly reservation line; thence along said line to the place of beginning (excepting the right to use in common all the water-ways within the above described limits)".

The agreement is contained in the report, at pages 27 and 28, in House of Representatives Document Number 247. I will also read that to the Court.

"Signature Rolls Red Lake Bands of Chippewa Indians, Minnesota.

"We, the undersigned, being male adult Indians over eighteen years of age, of the tribes or bands of Chippewa Indians occupying and belonging to the Red Lake Reservation, in the State of Minnesota, do hereby certify and declare that we have heard, read, interpreted, and thoroughly explained to our understanding, the act of Congress, approved January 14, 1889, entitled 'An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota' (Public No. 13), which said act is embodied in the foregoing instrument, and after such explanation and understanding, have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act, and each and all of the provisions thereof,
187 and do hereby grant, cede, relinquish, and convey to the United States all our right, title, and interest in and to all and so much of said Red Lake Reservation as is not embraced in the following described boundaries, to-wit:

"Commencing at the point on Thief River where the same crosses the line between Marshall and Polk Counties, thence easterly to the most northwesterly point of the upper Red Lake, thence easterly along the northerly shore of said upper Red Lake to upper Red Lake, thence easterly along the northerly shore of said upper Red Lake to a point due north of a point 1 mile east from the easterly end of the lower Red Lake, thence due south to the last-named point, thence southwesterly in a straight line to a point on Hay Creek, 1 mile from where said creek enters the lower Red Lake, thence south to a point from which a line extending west passes midway between what is called the 'big marsh' and the sugar

bush north of and nearest to said marsh, said sugar bush being on the Red Lake and White Earth Road; thence west along said line between said marsh and sugar bush to Clear Water River, said line being supposed to be about 6 miles south of the lower Red Lake; thence northwesterly along said Clear Water River to a point where said river crosses the boundary of Red Lake Reservation as the same has heretofore existed, thence along said reservation line to the place of beginning, as designated on a map published in 1888 by Rand, McNally & Co., of Chicago, Ill. (but all waterways within the reservation above described are to be free for commercial purposes to all citizens of the United States), for the purposes and upon the terms stated in said act, which said lands embraced within the foregoing boundaries have been reserved by the commissioners appointed under said act and as therein authorized for the purpose of making and filing the allotments therein provided for.

Witness our hands and seals hereto subscribed and affixed at the Old Red Lake Agency, on the Red Lake Reservation, in the State of Minnesota, this 8th day of July, 1889.

HENRY M. RICE (Seal)
JOSEPH B. WHITING (Seal)
Commission.

B. P. SHULER,
United States Indian Agent.

W. C. HUBBELL,
Secretary to Commission."
and Signatures of Indians.

188 The third item in connection with this objection and demurrer is the eighteenth annual report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institute. It is an official document of the Department of the Interior. We have here a certified copy, which I should like to have marked as Government's Exhibit 11.

(Government's Exhibit 11 marked for identification by the reporter).

Mr. Harries: The Attorney General's Office telegraphed me that the eighteenth annual report to which I have referred is out of print, and that there were no additional copies which could be certified and sent forward. Accordingly, a request was made for photostatic copies of the portions which are here relevant, and I will hand this to the Court, but I also

have a copy of the report itself, which is an official Government publication and taken from the Public Library in Duluth.

(Government's Exhibit 11 read and explained to the Court by Mr. Harries.)

(Government's Exhibits 12 to 20 inclusive marked for identification by the reporter.)

Mr. Harries: Government's Exhibits 12 to 17 inclusive are certified copies of application for homestead entry, and the Court will note that they are all stamped on the margin "Chippewa Lands, Act of January 14, 1889. Subject to Act of May 20, 1908." I particularly refer to the statement "Chippewa Lands, Act of January 14, 1889." The attention of the Court is also directed to the exhibits of the Government, Government's Exhibits 18, 19 and 20, being certificates of the register of the general land office at Cass Lake, Minnesota, which are offered in evidence pursuant to Section 9891 Mason's Minnesota Code. I will read to the Court what these show.

(Government's Exhibits 18, 19 and 20 read and explained to the Court by Mr. Harries.)

(Government's Exhibit 21 marked for identification by the reporter.)

189 Mr. Harries: One more item of evidence in this connection is contained in Government's Exhibit 21, certified copies of maps contained in the annual report of the Commissioner of Indian Affairs to the Secretary of the Interior, for the fiscal years ended June 30, 1888, 1889, 1890 and 1891. The purpose of this exhibit is to tie in the Act of January 14, 1889 provision with the treaty of July 8, 1889, by which the cession was made, by showing to the Court what those reservations were, at the dates named. The Court will note that the reservation embraces the Northwest Angle, and comes down to the south, considerably below Red Lake. Subsequent to that, and as the result of the treaty, these lands passed out of the reservation and became the property of the United States.

Having shown, then, that the tracts involved in the instant proceedings were acquired by the United States under the Act of January 14, 1889, and were embraced in the cession which the Red Lake Bank of Chippewa Indians made to the United States at that time, we come now to the significant

Act of Congress bearing upon these lands. There are two Acts to be considered. The first as an Act of June 7, 1897. It was passed by the Fifty-fifth Congress at its first session, and it is designated as Chapter Three of that session. It is contained in thirty statutes at page 67.

Fifty-fifth Congress. Sess. I.

30 Statutes 62-67

Chapter 3—An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes.

* *

190 For completing the necessary surveys within the Chippewa Indian Reservation in Minnesota, including expenses of examining and appraising pine lands, under the provisions of the Act approved January fourteenth, eighteen hundred and eighty-nine, to be reimbursed to the United States out of proceeds of the sale of their lands, fifty thousand dollars: Provided, That all lands acquired and sold by the United States under the "Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteenth, eighteen hundred and eighty-nine, shall be subject to the rights of the United States to construct and maintain dams for the purpose of creating reservoirs in aid of navigation, and no claim or right of compensation shall accrue from the overflowing of said lands on account of the construction and maintenance of such dams or reservoirs. And the Secretary of War shall furnish the Commissioner of the General Land Office a list of such lands, with the particular tracts appropriately described, and in the disposal of each and every one of said tracts, whether by sale, by allotment in severalty to individual Indians, or otherwise, under said Act, the provisions of this paragraph shall enter into and form a part of the contract of purchase or transfer of title.

Fifty-fifth Congress. Sess. II.

July 1, 1898.

Chapter 545—An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes

for the fiscal year ending June thirtieth, eighteen Hundred and ninety-nine, and for other purposes.

30 Statutes, 571-676.

* * *

191 For completing the necessary surveys within the Chippewa Indian Reservation in Minnesota, including expenses of examining and appraising pine lands, under the provisions of the Act approved January fourteenth, eighteen hundred and eighty-nine, to be reimbursed to the United States out of proceeds of the sale of their lands, fifty thousand dollars; Provided, That all lands heretofore or hereafter acquired and sold by the United States under the "Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteenth, eighteen hundred and eighty-nine, shall be subject to the right of the United States to construct and maintain dams for the purpose of creating reservoirs in aid of navigation, and no claim or right of compensation shall accrue from the overflowing of said lands on account of the construction and maintenance of such dams or reservoirs. And the Secretary of War shall furnish the Commisioner of the General Land Office a list of such lands, with the particular tracts appropriately described, and in the disposal of each and every one of said tracts, whether by sale, by allotment in severalty to individual Indians, or otherwise, under said Act, the provisions of this paragraph shall enter into and form a part of the contract of purchase or transfer of title.

192 The Court: I think it is very likely that this is the first time that attention has been called to this situation. I think it is a very close question in view of these statutes, as to whether these property owners have a right to demand compensation from the United States Government for the construction of any dam built either in whole or in part by the United States Government at the outlet of the Lake of the Woods. In other words, according to the statutes, they took their title subject to this condition, that they were not entitled to any compensation for the flowage of their land as the result of the building of a dam by the United States in aid of navigation, but, of course, it is true in this case—we can't say positively, of course, but apparently those who made this treaty, and apparently Congress in going ahead with this matter assumed at any rate that there would have to be some compensation paid to these people. Now, about the only argument that could be made against this argument is that possibly Congress had in mind that it was only

for such dams as should be solely in the aid of navigation, that those who obtained the lands should be entitled to no compensation for. Then, of course, it could also be argued that taking the treaty and the subsequent Acts of Congress into consideration, that it indicated an attempt on the part of Congress to disregard these provisions and give to these people who acquired these lands, damages regardless of the fact that under their homestead entries they were not entitled to any. I am not at all sure that the objection could not very well be sustained in this case, but we have gone ahead so far upon the theory that the owners of the lands were entitled to be paid their damages for the taking of these easements. If I should sustain the objection now, that disposes of all of these cases, and if the Circuit Court of Appeals should subsequently hold that the objection should not have been sustained, then we will have to go through the whole thing again, and I think probably the practical way to handle the matter is to get all of the questions we can into this one lawsuit, so that an appeal will settle everything that can be settled, and for that reason, and in view of the fact that I am not entirely clear that the objection should be sustained, I think I will overrule it at this time, and allow the Government an exception, and then tomorrow we will proceed.

Mr. Harries: We have an exception, of course, to the ruling?

The Court: The record will show an exception, and also that all of these exhibits which you have presented have been received in support of this objection which has been made. We will recess until tomorrow morning at ten o'clock.

* * * *

193 Thereupon, as additional foundation for the objection of the Government to evidence of the reservoir value of respondent-appellants' lands,

EDWIN E. CORRY,

A witness previously sworn, recalled by the Government for further direct examination, testified as follows:

Direct Examination:

By Mr. Harries:

Q. You have testified that it was part of your official duties as senior engineer of the United States War Department, to procure for the United States the flowage rights contemplated by the Treaty of 1925? A. Yes, sir.

Q. In carrying out those duties what, if any, difficulties did you encounter?

A. We found a lot of difficulties because of the fact that there were encumbrances, mortgages, taxes, ditch liens and things of that sort pending against these lands.

Q. Did you at the outset go into the market and endeavor to acquire the rights contemplated by the Treaty?

A. Yes, sir.

Q. And were conveyances made to the Government of such rights?

Mr. Lewis: Objected to as incompetent, irrelevant and immaterial.

The Court: Well, what is the purpose of the inquiry, Mr. Harries?

Mr. Harries: To show that some trading has gone forward in these particular rights, and acquisitions have been made.

The Court: He may answer.

Mr. Lewis: Exception.

A. Yes, we did make some deals, and secured some easements by direct negotiations.

Q. Why was that not continued?

A. Because of these difficulties principally, that I have just indicated.

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194 ADOLPH F. MEYER, a witness previously called and sworn, recalled on behalf of the Government, testified as follows:

Direct Examination.

By Mr. Harries:

I was the American representative employed as consulting engineer to the International Joint Commission in connection with the reference of the Lake of the Woods matter. In the discharge of my duties I investigated this matter for a period of approximately five years, employing a considerable force of assistants both in the office and in the field, and devoting an average of fifteen to twenty days time personally during some months, and during others my entire time to this work.

Q. What was the chief question that was the subject of your investigation?

A. The question of the official reference submitted to the question with respect to the most advantageous use of the waters of the lake, and the waters flowing into and from the

lake, and the shores and harbors of the lake. Perhaps a statement of the question itself, as referred to the Commission, is the best summary that I could make as to what the problem was.

Q. You may state what that is?

A. Would you like me to read the reference as to the questions?

Q. Yes.

A. This reference was made in June 1912, and reads as follows, addressed to the International Joint Commission of the United States and Canada: "Sirs: I have the honor to inform you that at the joint request of the Government of the United States and of the Government of the Dominion of Canada, under the provisions of Article IX of the Treaty of January 11, 1909, between the United States and Great Britain, the questions or matters of difference set forth below, which have arisen between them involving the rights, obligations, or interests of each in relation to the other, or to the inhabitants of the other, along their common fron-
195 tier between the United States and the Dominion of Canada, are hereby referred to the International Joint Commission for examination and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate.

The questions so referred are as follows:

1. In order to secure the most advantageous use of the waters of the Lake of the Woods and of the waters flowing into and from that Lake on each side of the boundary for domestic and sanitary purposes, for navigation and transportation purposes, and for fishing purposes, and for power and irrigation purposes, and also in order to secure the most advantageous use of the shores and harbors of the Lake and of the waters flowing into and from the Lake, is it practicable and desirable to maintain the surface of the Lake during the different seasons of the year at a certain stated level, and if so, at what level?

2. If a certain stated level is recommended in answer to Question 1, and if such level is higher than the normal or natural level of the Lake, to what extent, if at all, would the Lake, when maintained at such level, overflow the low lands upon its southern border, or elsewhere on its border, and what is the value of the lands which would be submerged?

3. In what way or manner, including the construction and operation of dams or other works at the outlets and inlets of

the Lake, or in the waters which are directly or indirectly tributary to the Lake or otherwise is it possible and advisable to regulate the volume, use and outflow of the waters of the Lake so as to maintain the level recommended in answer to Question 1, and by what means or arrangements can the proper construction and operation of regulating works, or a system or method of regulation be best secured and maintained in order to insure the adequate protection and development of all the interests involved on both sides of the boundary, with the least possible damage to all rights and interests, both public and private, which may be affected by maintaining the proposed level?

196 I have the honor to add that the Government of the United States will be glad to assist the Commission in obtaining any information which it may desire in the course of its investigation of the matters herein referred for its examination and report.

I am, Sirs,

Your obedient servant,

(Sg) P. C. KNOX."

A similar letter was sent by the Canadian Government to the Canadian section of the International Joint Commission.

Q. What interests did you find to be involved in a determination of this question?

Mr. Lewis: Is that material, if the Court please? Aren't we getting a long ways from the subject here?

The Court: He may answer.

Mr. Lewis: Exception.

A. We found first of all, in the order in which they were discussed in the report, the riparian land, the navigation and lumber interests, the use of the waters of the lake for domestic purposes and sanitary purposes, and the use for waterpower development at the outlets. And the navigation and power interests on the lower Rainy, the portion that is affected by the level of the Lake of the Woods, and the waterpower interests on the Winnipeg River, that is, on the river below the outlets.

Q. Did your investigation and the recommendation that you made pursuant thereto have in view the benefit of any particular interest, or how did you arrive at the conclusion you reached?

A. We considered what levels or forms of regulation would be the most advantageous to each particular interest,

and then weighed the advantages and the disadvantages of the different kinds of regulation to all of the interests, and tried to arrive at the level and the type of regulation which would result in the greatest aggregate benefit to all of the interests concerned.

Q. Now, briefly, Mr. Meyer, state what you found to be the interests of navigation and lumbering in the use of the waters of the lake?

197 Mr. Lewis: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Mr. Lewis: Exception.

A. The navigation and lumbering interests desired a fairly uniform level, that is, extreme low levels resulted in too shallow water in navigation channels, and it prevented the bringing of the logs from the outlets through the channels and up to the jack ladders, where they were taken up into the sawmills.

Q. A jack ladder is a device for lifting the logs out of the water and into the mill? A. Yes, sir.

Q. And with reference to the navigation interests, aside from what you have just said, is there anything further that you can state at this time?

A. The officer in charge of the district under which the improvements were made on the United States side, at Warroad and at Zippel, on the south shore, stated that at stages below 1058 it would be necessary to dredge those channels deeper, because they had been built originally on the assumption that a higher level would prevail.

Q. What did you learn as to the interests of fishing, Mr. Meyer?

A. The fishing interests also desired a fairly uniform level, and on the south shore particularly, not too high a level, because at the high levels the muskeg or peat is broken up by the waves, and it floats out into the lake, making the water dark, and undesirable from a fisherman's viewpoint.

Q. Tell us, if you know, whether the lake level has any effect on the spawning of fish?

A. The more uniform the level, the better for the spawning grounds.

Q. Are the interests to which you have referred, namely, navigation, lumbering and fishing, considerable on the lake?

A. The fishing interests are quite important. There was relatively little navigation by deep draft boats, but a good deal of navigation by shallow draft boats at the outlets. One

large boat had been used until about that time, but I
198 think that that was discontinued just about during those years of our investigation. There were some tugs used in connection with fishing operations that required a draft of four to five feet, as I recall it. The one large boat, I think, that operated for a number of years, from Kenora, required, I think, eight or ten feet. That was the only large boat that was in operation on the lake. There was quite extensive fishing, and the lumbering interests were not so extensive, and were becoming less and less important.

Q. Did you find, Mr. Meyer, that the interests of navigation required a higher level or a lower level than domestic and sanitary purposes?

A. The interests of navigation, to be best served, required a higher level.

Q. Would it be accurate to say that your official duty called for a reconciliation of the various interests, and a determination of the maximum aggregate benefits to be secured for all, taken together?

A. Yes, that was the question as we viewed it.

[A.] The outlets of the Lake of the Woods are at the point to which I am now pointing, the extreme northern end of the Lake. There are two principal natural outlets, one very much larger than the other, and a third natural high-water outlet at the west end of the bay, several miles to the west of the two principal outlets, and in addition there are two artificial outlets that have been cut through the ridge of rock that divides the Winnipeg River from the Lake of the Woods. There is a bay on the lower side, extending for several miles quite close to the lake itself, so that it was possible to cut channels through this ridge. These two outlets are now in use by the Lake of the Woods Milling Company. The high-water outlet was originally in use by the Keewatin Lumber Company, but has not been used for some time since. The eastern outlet was the first outlet of the two main natural outlets from which power was developed.

Q. Will you point to about where that eastern outlet is?

A. Unfortunately the map is not drawn on a sufficiently large scale in order to differentiate between
199 the several outlets.

Q. I wonder if you happen to have in your bag there a map that will show the country at the outlet?

Mr. Harries: I think there is another map that was introduced that would show it, Mr. Lewis.

Q. (continued) If that does not show it satisfactorily, if you have one of your own, we will produce that, Mr. Meyer.

Mr. Harries: Well, there is a detailed map there that will show that.

A. The Lake of the Woods is shown in the lower portion of this detailed map, and the Winnipeg River in the extreme upper portion. There are a number of islands and a number of channels as the map shows. The one fartherest east is the eastern outlet, in which is shown the Kenora Power Company. The western outlet is shown next. The water of course is flowing north, and then in a westerly direction, into the same bay or expanse of the Winnipeg River immediately below the Lake of the Woods. Toward the extreme left are the Canadian outlets. The two artificial channels are shown first, black marks being drawn across the channels to represent Mills A and C of the Lake of the Woods Milling Company. At the extreme western end of that bay there is the high-water outlet, which is now closed off, and which at present on this map shows no connection with the lower river. This was in use back in the early years, by the Keewatin Lumber Company.

Q. All right. Perhaps that gives us a picture of it. You may take the chair again. As I understand you then, there are all together five outlets counting the artificial ones?

A. Yes, sir.

Q. Five outlets to the lake? A. Yes, sir.

Q. How many dams are there?

A. There are two principal dams in the two main outlets, and an old structure across the high-water outlet, but that is a very minor structure. Then the mills themselves, that is, the hydraulic plans, in which the power is developed, constitutes the dam on the two artificial outlets. There is no other dam required in those outlets.

200 Q. When were those dams built?

A. The present Norman Dam in the western outlet, which is the principal outlet, was built in 1893 to 1895, but the stop-logs were not put in until 1898 in November. The dam consists of just a series of sluices, for discharging the water, and originally a rock fill which was later in 1925 replaced by a power house for development of power.

Q. While you are right there on that, realizing that perhaps none of us are familiar with the construction of dams, will you tell us what you mean by stop-logs, what their function is, and what the result of their use is?

A. The dam consists of masonry piers with grooves in them, into which large logs are dropped, so as to stop the flow of the water when the logs are in place. The logs are piled one on top of another, put in by machinery and taken out by machinery. They are roughly about eighteen inches

thick at the bottom, to withstand the pressure of the water, and they are not quite so heavy at the top. The stop-logs are taken out when it is desired to waste any water through the dam. As long as the water is being used for power development, it merely flows through the water wheels in the other portion of the dam. The eastern outlet is closed practically entirely by the power plant. The water that flows through there is all used for power purposes.

Q. As I understand you then, Mr. Meyer, the purpose of installing these stop-logs is for the generation of power? That is the way power is generated?

A. The purpose of the stop-logs, perhaps, better, is to hold the water back, so that it can flow through the water wheels and form the development of power, and the stop-logs are only taken out in time of flood, when it is necessary to waste water. The stop-logs are part of the dam, and are merely taken out when it is necessary to waste water. They form part of the barrier which holds the water back, so that it may be used for power development.

201 Q. In other words, you have piers built up something like these books, here? A. Yes, sir.

Q. And the logs are put in this way, into these grooves, and the water is back here, and it backs up here, and when you want to raise the water a little higher, you put in another stop-log? A. Yes, sir.

Q. And as you raise these stop-logs, that backs the water up, does it not? A. Holds it back, yes.

Q. And the higher the water is raised here at the dam, the more country overflows back of the dam? A. Yes.

Q. Now, you say that the dam, that is, the Norman Dam, was completed in 1895, did you say?

A. It was completed between 1893 and 1895, but the stop-logs were not put in until November, 1898.

Q. To what extent were the stop-logs put in then, that is, to what height, did they start raising the water in 1898?

A. The intention was to raise the water, or to hold the water at the ordinary summer level.

Q. What contour would that be, or what sea level datum?

A. The actual level to which the water was raised varied, of course, throughout the year, as the records of the Commission clearly show. The average raise in the water level was somewhere near three feet.

Q. Do you recall, now, Mr. Meyer, without referring to data, what the level was, the high level at which the water was maintained?

A. It varied, of course, through the year, so that there was no one level at which it was continually maintained, but somewhere in the neighborhood of 1060.5.

Q. What I am really getting at is whether ever since 1898 the water of the Lake of the Woods has been controlled in substantially the same way as it is being controlled now?

202 A. Yes, in a general way it has been since that time, controlled and raised to approximately the same extent as it is raised at the present time.

Q. So, as I understand you, the lands we are interested in here as belonging to these three respondents, as well as all the other lands indicated on the maps which are introduced here, have been flooded through all these years from 1898, to substantially the same extent that they have been flooded in recent years, and at the present time?

A. Yes, sir.

Q. There has been no substantial change in that regard?

A. No, sir.

* * * * * *

Q. What were those dams put in for, and what power was being generated, and what about the interests of navigation? We might as well go into that.

A. The first dam, which I have not mentioned before, that was built in the lake, was put in in 1887, in this same outlet, the western outlet, in which the Norman Dam was later built. That dam was a fixed dam, a timber cribbed dam, built in an entirely different way. It was farther up, you might say almost in the lake, where a long dam could be put in, which would raise the low water considerably, for the improvement of navigation, but which would not raise the high water very much. That dam functioned until the stop-logs were put into the Norman Dam in the winter of 1898-1899, and in 1899 the old rollerway dam, as it was known, was blasted out.

Q. The rollerway dam was this old fixed dam, you told us about a moment ago?

A. Yes, and that was put in, in aid of navigation. The Ontario government made an agreement with the owners of the Norman Dam, namely, the Canadian Power Company, on the right to control that dam, to put in the stop-logs and take them out as they saw fit, to keep up the level in the interests of navigation, and for the saw mills and flour mills at

203 the outlet of the lake. The agreement also stated that if at any time the Power Company wanted to use the dam for power purposes, that they could give notice to terminate the agreement.

Q. At that time, Mr. Meyer, were there any considerable number of power plants built on farther down the river, or

was the power that was generated at that time, as early as 1898, practically all generated at the outlet of the lake?

A. As I recall it, there were no power plants in the river, below at that time.

Q. Now, will you very briefly, sketch for the Court and Jury, please, the development of these water-power projects down the course of the Winnipeg River, and tell us a little bit about them as you go along, so we will know a little about the magnitude of the possibilities there?

A. Right at the outlet there is a fall of about twenty feet, and in the river below there is a total fall of about two hundred and ninety feet that can be used for power development. The first main power is at White Dog Rapids, where there is about forty-five feet of fall. That has not been developed. Then there are additional natural falls in the river between there and Lake Winnipeg, varying in height, at which power has been developed, and other sites which are still undeveloped.

At this point government counsel asked leave to interrupt for the purpose of making an objection to the introduction of any evidence and interposing a demurrer to evidence in support of any claim for compensation for damages accruing from the overflow of any of the lands involved herein on account of the construction and maintenance of dams for the purpose of creating reservoirs in aid of navigation; and cited the Indian treaties and the laws supporting the Government's position, as more fully shown at pp. 9-16, inclusive, herein.

After hearing argument, the Court overruled the objection and demurrer (the ruling appearing verbatim p. 16 herein), and

204 ADOLPH F. MEYER, a witness previously called on behalf of respondents, having been previously sworn, continuing.

By Mr. Lewis:

Q. Can you give us first then the area, the surface area of the Lake of the Woods?

A. The water area is 1485 square miles at an average level of about 1059 to 1060.

Q. For our convenience in comprehending this matter of acreage, Mr. Meyers, could you not give us the totals in the two countries bordering on the lake?

A. The total area in the United States and Canada between the old meander shore line and contour 1064 is 78,081 acres—those were the lands that, in our judgment, were af-

fected by the proposed reservoir and had been affected by the past reservoir use of the lake.

Q. Well, that is, the regimen of levels provided by the treaty contemplated the same effect of all lands between the old meander line and contour 1064, is that right?

A. Yes, sir.

Q. Won't you explain for us, Mr. Meyer, where the waters were designed to stand, according to the treaty?

A. The ordinary maximum level was specified at 1061.25. Whenever the water was below 1061, the control of the outlet was to be entirely in the hands of Canada. And when it raised above 1061 the outflow was to be controlled by a joint board, consisting of representatives of both the United States and Canada.

With the waters in a state of nature the level of the lake would have reached above elevation 1061 only once in a period of thirty years.

Q. Now under a state of control as contemplated by the treaty and having in mind, as I am sure you have, the requirements of power and other interests, for how much of the time do you estimate that the level of the lake will be maintained at or above 1061, with the lake under a state of control?

205 A. In my judgment the mean monthly level of 1061½ will probably be reached or exceeded under control, as provided by the treaty of 1925, on an average of once every five years.

Q. And what is your estimate, Mr. Meyer, of the average level at which the water in the lake will be maintained under a state of control, having in mind the requirements of power and other interests that will be interested in keeping the waters of the lake as high as permissible?

A. In my judgment the average level will be between 1060½ and 1061—I would say 1060½. I have not made an exact computation of that, but that is my best judgment at this time. I might add to that answer that I gave you a moment ago that while the ordinary maximum is at 1061.25, under the treaty the average level will probably be in the neighborhood of 1060.

Q. Do you care to explain that so we will know what you have in mind—how you compute that?

A. The treaty provided for an ordinary maximum of 1061.25, and that between 1056 and 1061 the outflow shall be

regulated so as to maintain the highest possible dependable outflow. That means that the reservoir will be kept filled as much as possible, and will be drawn down only as required to supply this dependable flow; so that the reservoir does not need to be partially empty in the springtime to provide for inflow; although there is of course provision under the treaty undoubtedly for the regulating Board to do so, if they feel it necessary to do so in order to prevent higher levels than the 1062.5.

The Keewatin Power Company owns the cribwork that closes the westernmost outlet, and either the Keewatin Power Company or its subsidiary now controls the structures in the eastern outlet, but the dam itself, in the western outlet, is under Government control.

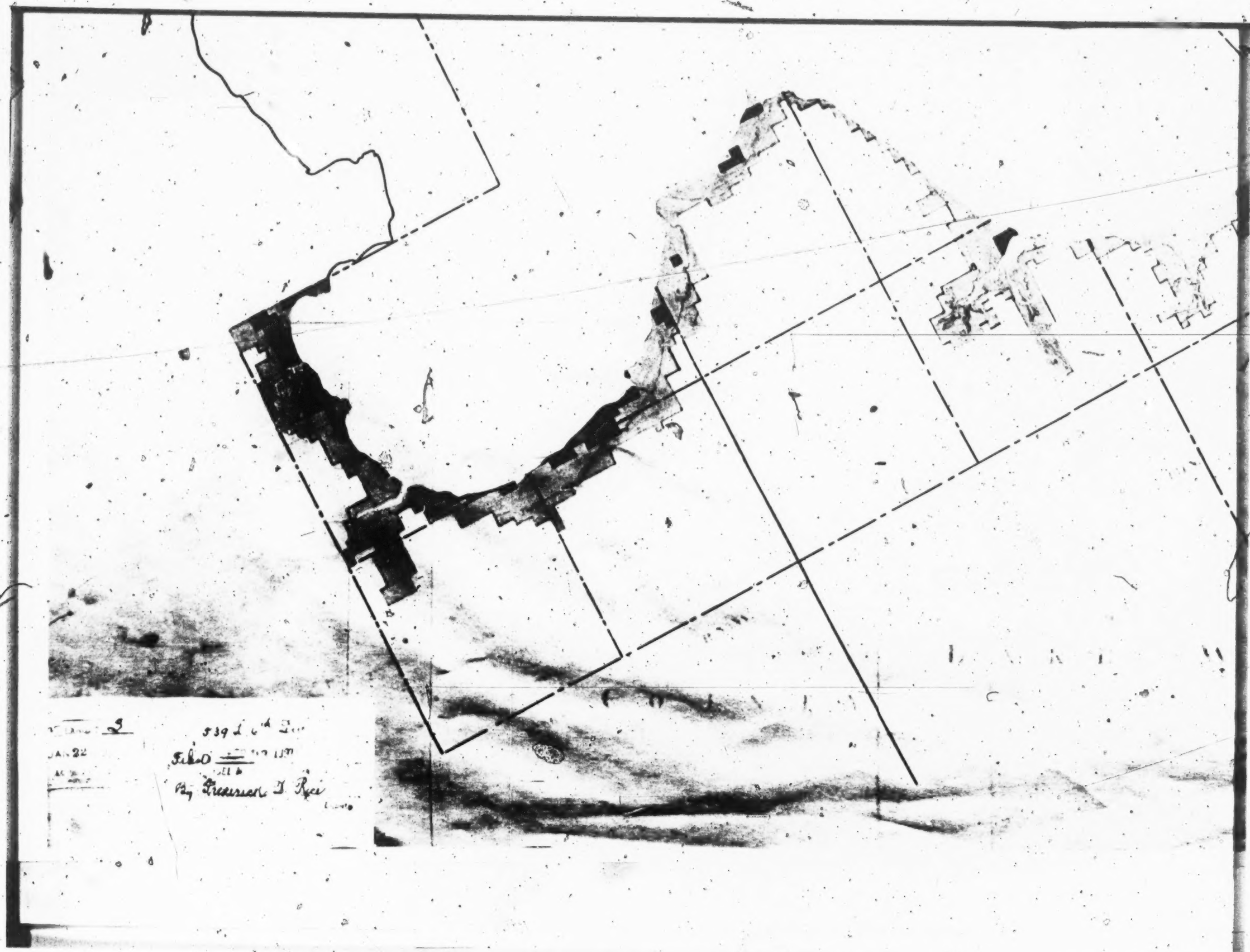
Q. Which Government?
A. The Canadian Government, between the levels of 1056 and 1061.

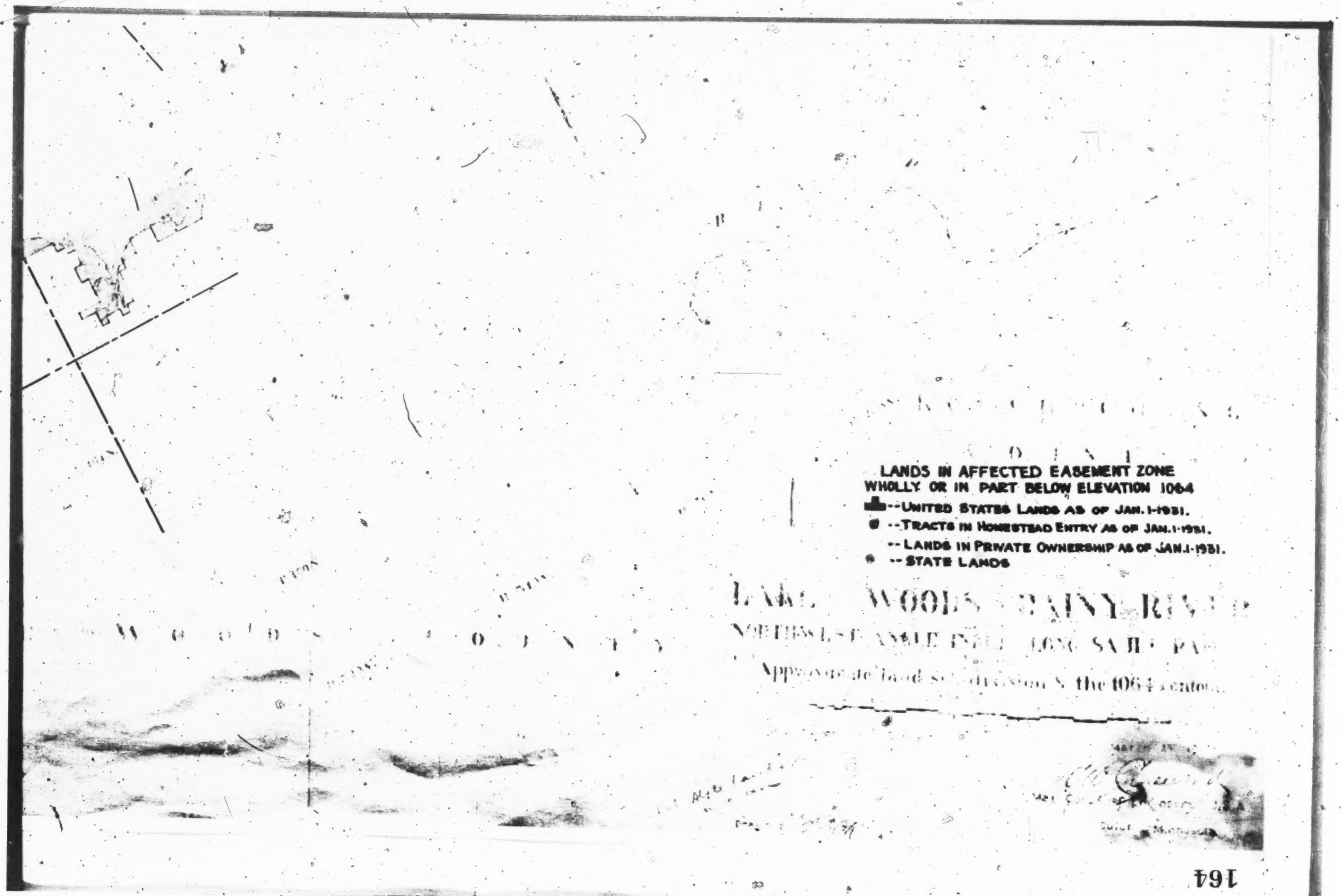
206 After submission of respondent's offers to prove, the following proceedings were had.

The Court: What I am getting at is this: you do not claim that any of this evidence contained in these offers goes to the question of any other values of these lands which are to be submitted to the jury; in other words, you do not claim that by sustaining the objection of the Government, that I am preventing you from putting in evidence all that you would like to have before the jury in determining the value of these lands exclusive of their reservoir value?

Mr. Lewis: That is right. The facts which are offered to be proved do not bear upon the question of any other value except the value of the flowage easements and the reservoir value of the property.

The Court: All right.


JAN 22
By Frederick D. Rice


LANDS IN AFFECTED EASEMENT ZONE
WHOLLY OR IN PART BELOW ELEVATION 1064
--UNITED STATES LANDS AS OF JAN. 1-1931.
--TRACTS IN HOMESTEAD ENTRY AS OF JAN. 1-1931.
--LANDS IN PRIVATE OWNERSHIP AS OF JAN. 1-1931.
--STATE LANDS

207 (Petitioner's Exhibit 3, Map Showing Lands Bordering on Lake of the Woods.)

SCHEDULE OF INDIAN

Date	Where or how concluded	Reference	Tribe	Description of cession or reservation
1889 Mar. 2	Act of Congress.	Stat. L., XXV, 888.	Lower Brulé Sioux.	For the Indians receiving rations and annuities at the Lower Brulé agency, the lands bounded as follows: Beginning on the Missouri river at Old Fort George; thence running due W. to the western boundary of Fresho county; thence running S. on said western boundary to the forty-fourth degree of latitude; thence on said forty-fourth degree of latitude to western boundary of T. 72; thence S. on said township western line to an intersecting line running due W. from Fort Lookout; thence eastwardly on said line to the center of the main channel of the Missouri river at Fort Lookout; thence N. in the center of the main channel of the said river to the original starting point.
			Crow Creek Sioux.	For the Indians receiving rations and annuities at Crow Creek agency, the following lands: The whole of T. 106, R. 70; T. 107, R. 71; T. 108, R. 71; T. 108, R. 72; T. 109, R. 72, and the S. half of T. 109, R. 71; and all, except secs. 1, 2, 3, 4, 9, 10, 11, and 12 of T. 107, R. 70, and such parts as lie on the E. or left bank of the Missouri river, of the following townships, namely: T. 106, R. 71; T. 107, R. 72; T. 108, R. 73; T. 108, R. 74; T. 108, R. 75; T. 108, R. 76; T. 109, R. 76; T. 109, R. 74; S. half of T. 109, R. 75; and T. 107, R. 73; also the W. half of T. 106, R. 69, and secs. 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33 of T. 107, R. 69.
May 6	Executive order.	.....	Mission Indians.	The President orders certain lands to be withdrawn from sale and set apart as a reserve for the Mission Indians, as follows: T. 10 S., R. 4 E., and secs. 3 and 4, T. 11 S., R. 4 E. of the San Bernardino meridian, except so much of the same as is covered by the patents issued to J. J. Warner, Jan. 16, 1880, and to Harmon T. Helm, Jan. 16, 1886, are hereby withdrawn from sale and settlement, and set apart as a reservation for the Mission Indians: Provided, however, that any other tract or tracts the title of which has passed out of the U. S., or to which valid, legal rights have attached under existing laws of the U. S. providing for the disposition of the public domain, are also hereby excepted and excluded from the reservation hereby created.
July 8 to Nov. 21	Agreement...	H. R. Ex. Doc. 247, 51st Cong., 1st sess.	Chippewa of Minnesota.	By agreement various bands of these Indians respectively cede, as specified below, their title to the sundry tracts designated.
			Red Lake Chippewa (1).	Cede to the U. S. all their title and interest in so much of the Red Lake reservation as is not embraced in the following boundaries: Commencing at the point on Thief river where the same crosses the line between Marshall and Polk counties; thence easterly to the most northwesterly point of the upper Red lake; thence easterly along the northerly shore of said upper Red lake to a point due N. of a point 1 mile E. from the easterly end of the lower Red lake; thence due S. to the the last named point; thence southwesterly in a straight line to a point on Hay creek 1 mile from where said creek enters the lower Red lake; thence S. to a point from which a line extending W. passes midway between what is called the "Big marsh" and the sugar bush N. of, and nearest to, said marsh, said sugar bush being on the Red Lake and White Earth road; thence W. along said line between said marsh and sugar bush to Clear Water river, said line being supposed to be about 6 miles S. of the lower Red lake; thence northwesterly along said Clear Water river to the point where said river crosses the boundary of Red Lake reservation as the same has heretofore existed; thence along said reservation line to the place of beginning, as designated on a map published in 1898 by Rand, McNally & Co., of Chicago, Illinois. (Signed July 8, 1889.)

LAND CESSIONS—Continued.

Historical data and remarks
By the act of Jan. 14, 1889, the President was authorized to appoint within sixty days thereafter, three commissioners to negotiate with the various bands of Minnesota Chippewa for the cession of all their lands in Minnesota, except the White Earth and Red Lake reservations, and such of these as were not required to fill allotments to the Indians. The negotiations were not all made on the same day, however. As they are all the result and parts of one transaction, they are all brought together here under a general heading.
The ceded portion is shown in the blue plat.....
The restricted reservation is the green plat.....

SCHEDULE OF INDIAN

ibe	Description of cession or reservation
Brulé	For the Indians receiving rations and annuities at the Lower Brule agency, the lands bounded as follows: Beginning on the Missouri river at Old Fort George; thence running due W. to the western boundary of Presho county; thence running S. on said western boundary to the forty-fourth degree of latitude; thence on said forty-fourth degree of latitude to western boundary of T. 72; thence S. on said township western line to an intersecting line running due W. from Fort Lookout; thence eastwardly on said line to the center of the main channel of the Missouri river at Fort Lookout; thence N. in the center of the main channel of the said river to the original starting point.
reek	For the Indians receiving rations and annuities at Crow Creek agency, the following lands: The whole of T. 106, R. 70; T. 107, R. 71; T. 108, R. 71; T. 108, R. 72; T. 109, R. 72, and the S. half of T. 109, R. 71; and all, except secs. 1, 2, 3, 4, 9, 10, 11, and 12 of T. 107, R. 70, and such parts as lie on the E. or left bank of the Missouri river, of the following townships, namely: T. 106, R. 71; T. 107, R. 72; T. 108, R. 73; T. 108, R. 74; T. 108, R. 75; T. 108, R. 76; T. 109, R. 73; T. 109, R. 74; S. half of T. 109, R. 75; and T. 107, R. 73; also the W. half of T. 106, R. 69, and secs. 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32, and 33 of T. 107, R. 69.
Indi-	The President orders certain lands to be withdrawn from sale and set apart as a reserve for the Mission Indians, as follows: T. 10 S., R. 4 E.; and secs. 3 and 4 T. 11 S., R. 4 E. of the San Bernardino meridian, except so much of the same as is covered by the patents issued to J. J. Warner, Jan. 16, 1880, and to Harmon T. Helm, Jan. 16, 1880, are hereby withdrawn from sale and settlement, and set apart as a reservation for the Mission Indians: Provided, however, that any other tract or tracts the title of which has passed out of the U. S., or to which valid, legal rights have attached under existing laws of the U. S. providing for the disposition of the public domain, are also hereby excepted and excluded from the reservation hereby created.
a of ota.	By agreement various bands of these Indians respectively cede, as specified below, their title to the sundry tracts designated.
Chip- a.	Cede to the U. S. all their title and interest in so much of the Red Lake reservation as is not embraced in the following boundaries: Commencing at the point on Thief river where the same crosses the line between Marshall and Polk counties; thence easterly to the most northwesterly point of the upper Red lake; thence easterly along the northerly shore of said upper Red lake to a point due N. of a point 1 mile E. from the easterly end of the lower Red lake; thence due S. to the the last-named point; thence southwesterly in a straight line to a point on Hay creek 1 mile from where said creek enters the lower Red lake; thence S. to a point from which a line extending W. passes midway between what is called the "Big marsh" and the sugar bush N. of, and nearest to, said marsh, said sugar bush being on the Red Lake and White Earth road; thence W. along said line between said marsh and sugar bush to Clear Water river, said line being supposed to be about 6 miles S. of the lower Red lake; thence northwesterly along said Clear Water river to the point where said river crosses the boundary of Red Lake reservation as the same has heretofore existed; thence along said reservation line to the place of beginning, as designated on a map published in 1888 by Rand, McNally & Co., of Chicago, Illinois. (Signed July 8, 1889.)

LAND CESSIONS—Continued.

Historical data and remarks	Designation of cession on map: Number	Location
	704	Dakota 3.
	705	Dakota 3.
		California.
By the act of Jan. 11, 1889, the President was authorized to appoint, within sixty days thereafter, three commissioners to negotiate with the different bands of Minnesota Chippewa for the cession of all their lands in Minnesota, except the White Earth and Red Lake reservations, and so much of these as were not required to fill allotments to the Indians. The agreements were not all made on the same day, however. As they are all under one act and parts of one transaction, they are all brought together here under one general heading.		
The ceded portion is shown in the blue plat	706	Minnesota (northern portion).
The restricted reservation is the green plat	707	

(Government Exhibit 11.)
(Filed in U. S. District Court on Feb. 13, 1931.)
2008

1398731
"B"

E-147

[redacted]

UNIT[redacted]STATES
DEPARTMEN[redacted]F THE INTERIOR
GENER[redacted]LAND OFFICE
[redacted]HINGTON

December 16, 1930.

I hereby certi[redacted] the annexed copies of papers, filed under Cass Lake [redacted], formerly Crookston 018017, are

539 L. 6th Div

3.

Frederick D. Rice

true and lit[redacted]emplifications of the originals on file in this offi[redacted]

IN[redacted]ONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

Act[redacted]stant Commissioner of the General Land Office.

...ary of the Interior December 24, 1919

...RTMENT OF THE INTERIOR

RECEIVED
U. S. LAND OFFICE
CROOKSTON, MINN.
Date MAR 24 1923
Hour _____

...HOMESTEAD ENTRY

...E, CROOKSTON, MINNESOTA

SERIAL NO 018017

APPLICATION.

RECEIPT NO 2548935

...Miss _____ (male), a resident of ...sota, (reside in case of the former) do hereby apply ...ection 2289, Revised Statutes of the United States, the

...NE, NW¼ Sec. 25, and NE SE Section ... 24 T. ___, 5th principal Meridian, containing ...han the Crookston, Minnesota, land district; ... I am not the proprietor of more than 160 ... or Territory; that I _____ have (filed declaration) of intention to become a _____ citizen of the United States, and am single and over twenty-one years of age; that my post-office address is Box 403, Terrace, Minnesota that this application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation; that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation or syndicate in making this entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered, or any part thereof; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract, in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which I may acquire from the government of the United States will inure in whole or in part to the benefit of any person except myself. I further swear that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; and that I have not heretofore made any entry under the homestead laws or filed a soldier's or sailor's declaratory statement, ...

5/28/30 Patent Issued

that I am well acquainted with the character of the land herein applied for and with each and every legal subdivision thereof, having personally examined same; that there is not to my knowledge within the limits thereof any vein or lode or quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel, salt spring, or deposit of salt, nor other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that my application therefor is not made for the purpose of fraudulently obtaining title to mineral land; that the land is not occupied and improved by any ...

Elias A Olsen

Note.—Any person swearing falsely to the above affidavit shall be punished as provided by law for perjury. (See Sec. 125, U. S. Criminal Code, over.)

Posted 5-1-23 in Vol. 47, p. 99, by ..., Div. "Q."

210

Examined and Passed U. S. L. O. MAY 3 1923

169

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by); that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office in Baudette, Beltrami County, Minnesota, within the Crookston, Minnesota land district, this 21st day of March, 19 23.

United States Commissioner, District of Minnesota.

UNITED STATES LAND OFFICE AT CROOKSTON, MINNESOTA

3/31- , 1923

I HEREBY CERTIFY that the foregoing application is for surveyed land of the class which the applicant is legally entitled to enter under Section 2286, Revised Statutes of the United States, that there is no prior valid adverse right to the same, and has this day been allowed.

Martin Widston

Register.

210a

171

OAK MERCANTILE COMPANY

DEALERS IN
GENERAL MERCHANDISE
FURS, TIMBER AND FISH
OAK ISLAND, MINN.
ON LAKE OF THE WOODS

RECEIVED
LAND OFFICE
...KSTON, MINN.
DATE SEP 1 1923
HOUR

State of Minnesota
County of Lake of the Woods

Elias Olsen being first duly sworn on oath deposes and says; that he could not get lumber on to his claim last winter (1922) on account of deep snow & where the snow did go down the ice was unsafe - the muskeg being open and that it is impossible to get in there with a team in the summer and on account of these facts he r[illegible]t-fully requests an extension of time [illegible] will [illegible] him to get in there this [illegible] after the ice has formed and he [illegible] that he be granted extension of [illegible] December 1st 1923.

Signed Elias Olsen

[illegible] & sworn to before me a Justice [illegible] Angle T.S. Lake of the Woods County [illegible] Minnesota this 11th day of Sept. 1923

P.S. Smith
Justice of the Peace

211

173

OAK MERCANTILE COMPANY

DEALERS IN
GENERAL MERCHANDISE
FURS, TIMBER AND FISH

OAK ISLAND, MINN.
ON LAKE OF THE WOODS

9/11 - 23

Mr Martin Widstrom
U. S. Land office
Crookston

Dear Sir

Please find enclosed the affidavit of Elias Elsin requesting extension of time [illegible] 23 [illegible] his homestead located in N. W. angle. I might say that I personaly know the man and have resided here for several years and I fully believe the statements as sworn to by him.

Bert Smith
Justice of the Peace
Oak Island
Minn.

RECEIVED
U. S. LAND OFFICE
CROOKSTON, MINN.
Date _____
Hour _____

175

RECEIVED
OFFICE
MINN.
1924

4-065
(Form approved by the Secretary of the Interior July 16, 1913.)

DEPARTMENT OF THE INTERIOR.

APPLICATION FOR AMENDMENT.

(Section 2172, R. S., amended.)

Can. f. 1 2/100 R# 2549738

U. S. LAND OFFICE ..... No. .....

I, Elias A. Olson of Now of Oak Island Minn. formerly of Warroad Minn. (Give post-office address.)

having made Hd. app. (Kind of entry, selection, or location) No. 018017

for the S.W. 1/4 N.W. 1/4 sec 25 and S 1/2 N.E. 1/4, and N.E. 1/4 S.E. 1/4 Section 26

Township 168 N, Range 34 W, 5th Principal Meridian, Crookston Minnesota Land District, do hereby apply for amendment thereof in such manner and with such effect as that, when so amended, said entry will include and embrace the following-described lands, and no others, to-wit:

S.W. 1/4 N.W. 1/4 sec 25

S.E. 1/4 N.E. 1/4, N.E. 1/4 S.E. 1/4 sec 26, and fractions lying in N 1/2 N.W. 1/4 section 25

Township 168 N, Range 34 W, 5th principal Meridian, and, being first duly sworn, upon oath say: That I originally intended to enter the Fractions Composed of N 1/2 N.W. 1/4 section 2 (Describe lands applicant intended to enter) in order to get to my land by boat as there is no roads & I found that Alexander Leslie had it so I took what was left

Township 168 N, Range 34 W, 5th Principal Meridian; that as the consequence of mistake and misinformation, said claim was not made to embrace all (or any portion) of the lands so intended to be entered, but, on the contrary, included and embraced lands not selected or intended to be entered by me, and which I do not desire to keep and retain in my said claims; that the error or mistake from which I desire relief, and the reason why I do not desire to maintain and perfect the claim as now made and recorded, will be now stated and explained as follows:

(Set out fully a statement of the cause of the error and of the reason why amendment is necessary or desirable. Applicant should also state when his error or mistake was discovered, and why it was not sooner discovered.)

I thought I still had water front on the land as originaly entered but find that there is not water enough for boats and its too soft and miry to go even on foot as there has never been anything done on the Alexander Leslie entry I consider it only fair to ask for a change which will enable me to live there and perfect my entry, as I cannot possibly get to my land without. I get those fractions & there only by boat

Vol 49/42 Filed Nov 4 1924 F.H.C. 49/42 2126

177

as the Condition is at present I cannot get to my land either by boat or overland

I do further declare that I am well acquainted with the character of the land now applied for, and every portion thereof, and from my personal knowledge I swear that there is not within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or any deposit of coal; nor within the limits of said lands any placer, cement, gravel, or other valuable mineral deposits; nor is there any salt spring or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land; and that my application therefor is not for the purpose of fraudulently obtaining title to mineral land; that the land applied for is not occupied nor claimed by any adverse claimant.

The character of the land applied for is as follows:

(Describe the character of the land by legal subdivisions, and state amount and kind of timber on each subdivision, if any. If the application pertains to an entry under the enlarged homestead law, it should be shown whether any of the land contains merchantable timber, and whether any portion is susceptible of irrigation at a reasonable cost from any known source of water supply.)

all the land is but little higher than lie of Lake and has no salable timber it is covered with willows and small poplar — an excellent meadow when clear

Applicant further avers that the lands embraced in his entry, as now existing and of record, are in the same state and condition as when entry was made by him, no timber or other thing of value having been removed therefrom by applicant, or by any other person, by his procurement, or with his consent and acquiescence; that I have not sold, assigned, transferred, or relinquished said land, or any portion thereof, or obligated myself to do so.

Elias A. Olson
(Sign here, with full Christian name.)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. See section 125, United States Criminal Code (over).

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (~~or has been satisfactorily identified before me by~~ _____); (Give full name and post-office address.)

that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described; and that said affidavit was duly subscribed and sworn to before me, at my office, in Oak Island P.O. (Town) Lake of the Woods County Minnesota (County and State), within the Crookston, Minnesota Land District, this 27th day of September, 1924

P. S. Smith
(Official designation of officer.)

(2)

P. S. SMITH,
Notary Public, Lake of the Woods County, Minn.
My commission expires November 18th, 1930.

179

1-54

CORROBORATING AFFIDAVITS.

AFFIDAVIT OF WITNESS AS TO FACTS.

I, Oscliff Hansen (Given and Christian names), whose post-office address is Oak Island (Post-office) Minn., being 27 years of age, and by occupation a Farmer, do solemnly swear that the facts within my personal knowledge relative to the mistake of Elisa a Olson in filing upon the S½ NW¼ NW¼ sec. 26 S½ NE¼, NE¼ SE¼ Section 26 Township 168 N. Range 34 W. 5th Principal Meridian, Cookston Minnesota Land District, the precautions taken to avoid said error, and the grounds on which application for amendment is filed, are as follows:

(If the application pertains to an entry under the enlarged homestead law, the witness should state whether any of the land contains merchantable timber, and whether any portion is susceptible of irrigation at a reasonable cost from any known source of water supply.)

There are no Roads Mr Olson thought he could get to the land by boat. and found he could not do so, by taking those factions he can get a dock in navigable water

My knowledge of the foregoing facts was acquired as follows: Personally acquainted with this district

Oscliff Hansen (Given and Christian names)

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by), and I verily believe affiant to be a credible witness and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me, at my office, in Oakland (Town), Lake of the Woods County, State of Minnesota, within the Crookston Minn. and District, this 27th day of September, 1924

P S Smith

(Official designation of officer.)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. See section 125, United States Criminal Code (over).

(3)

P S SMITH, Notary Public, [illegible] My commission expires [illegible]

213a

181

AFFIDAVIT OF WITNESSES AS TO CHARACTER AND REPUTATION OF APPLICANT

We, Orsleff Hansen (Give full Christian name) of Oak Island Minn (Give full post-office address)

29 years of age, and by occupation Farmer

and Philip Schyler Smith (Give full Christian name) of Oak Island Minn (Give full post-office address)

39 years of age, and by occupation Farmer

do solemnly swear that we have been well acquainted with the applicant 2 years and 8 years, respectively; that we have read the statements made by him in his said application; that he is a person of truth and veracity, and that we believe said statements to be true.

Orsleff Hansen
(Sign here, with full Christian name.)

Philip Schyler Smith
(Sign here, with full Christian name.)

I HEREBY CERTIFY that the foregoing affidavit was read to or by affiants in my presence before affiants affixed signatures thereto; that affiants are to me personally known (~~or have been satisfactorily identified before me by~~), and I verily believe affiants to be credible witnesses and the identical persons hereinbefore described, and that said affidavit was duly subscribed and sworn to before me, at my office in Oak Island (Town) Lake of Woods County, State of Minnesota, within the Crookston Minn. Land District, this 27th day of September, 1924

P. S. Smith
P. S. SMITH,
Notary Public, Lake of the Woods County, Wis.
(Official designation, Commission expires November 18th, 1930.)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. See section 125, United States Criminal Code (below).

UNITED STATES LAND OFFICE at Crookston, Minn.
Oct. 10, 1924

WE HEREBY CERTIFY that the foregoing application is for surveyed land and that there is no prior valid adverse right to the same. We recommend that the application be allowed
(Disposition is recommended, and not recommended.)

Martin Wilstein
Register.

Receiver.

UNITED STATES CRIMINAL CODE.

SEC. 125. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which [illegible] States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written [illegible] ration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath, state or subscribe [illegible] matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars [illegible] not more than five years.

214

183

Serial No 018017

Withdrawal of part of request for amendment - 1398731-201

U S Land Office Crookston Minnesota

Elias A Olsen being duly sworn, states that he is the same identical person who on March 31, 1924 made homestead entry, Crookston serial No. 018017, for the S.W. 1/4 N.W. 1/4 sec 25, S.E. 1/4 N.E. 1/4, N.E. 1/4 S.E. 1/4, sec 26, T168 N., R 34 W., of the 5th P.M. and who on Oct. 3, 1924, filed an application for amendment the said entry so as to include Lot 1 sec. 25 and lot 2 sec 25 and to exclude S.W. 1/4 N.E. 1/4 sec. 26

The said application having been refused by the Commissioner of the General Land Office in his letter C. of June 22, 1925 which also carries the suggestion that it can be allowed if it includes Lot 2 and excludes lot 1, also - should you desire Lot 1, could get it by making a new application and dropping one more of the forties. I hereby repeat my request for Lots 1 and 2 sec. 25; and in addition include that lot which lies in (Lot 1) N.E. 1/4 N.E. 1/4 sec 26, and exclude N.E. 1/4 S.E. 1/4 sec. 26, S.W. 1/4 N.E. 1/4 sec. 26 leaving the entry to include (Lots 1 and 2 sec. 25 and that lot lying in (Lot 1) N.E. 1/4 N.E. 1/4 sec. 26., S.W. 1/4 N.W. 1/4 sec 25., S.E. 1/4 N.E. 1/4 sec 26., T168 N., R. 34 W., 5th P.M),

Yours Respectfully

Elias A. Olsen

Subscribed and sworn to before me this 19th day of February 1925

O. S. Smith

P S G

Notary Public ... Wards County, Minn.
My Commission ... November 18th, 1930.

RECEIVED
U. S. LAND OFFICE
CROOKSTON, MINN.
Date [illegible] 28 1925
Name

214a

185

216 4—621

Department of the Interior
United States Land Office

Oak Island, Minn.
(Place.)

June 4, 1929.
(Date.)

Entry Stamped on Records.
J. R. Waters, Register.

1398731—202
Received
U. S. Land Office
Cass Lake, Minnesota
Date June 8, 1929.
Hour 9 a. m.

Relinquishment of Entire Claim

I hereby relinquish to the United States all my right, title, and interest in and to Entry No. ....., made at .....
(Name Land Office where entry was made)
....., the land being described as follows: ..... Section ....
....., Township ....., Range .....,
..... Meridian.

.....
(Signature)

Witnesses:

.....
(Name and address.)

.....
(Name and address.)

Acknowledged before me this ..... day of ....., 19

.....
.....
(Official designation of officer.)

The relinquishment accompanying a Repayment Application must be executed before the Register or Receiver, or before an officer qualified to take acknowledgments of deeds.

Other relinquishments may be accepted if the signature is attested by two witnesses.

Relinquishments of homestead entries can not be accepted if the entryman be dead unless executed by the statutory successors named in Sec. 2291, R. S. Where no widow survives and the relinquishment is executed by the heir or heirs, a corroborated affidavit must be attached setting forth the names of all the heirs, and their relationship to the entryman.

Relinquishment of Portion of Entry.

I hereby relinquish to the United States all my right, title, and interest in and to the following described land: SW¼ NW¼ Sec. 25, and SE¼ NE¼ Sec. 26, Township 168 N., Range 34 W. 5th Prin. Meridian, being part of the land embraced in Entry No. Crookston 018017, Cass Lake 013608, made at Crookston, Minn.

(Signed) ELIAS ALFRED OLSON.

Acknowledged before me this fourth (4th) day of June, 1929.

(Seal)

(Signed) PHILIP S. SMITH,
U. S. Commissioner.

(Official designation of officer.)

5/28/30 noted in "O" R V L

[illegible]

HOM[illegible]RY.

Date [illegible]

Hour [illegible]

U. S. LAND OFFICE [illegible]

FINAL PROO[illegible]

TESTIMONY OF CLA[illegible]

QUESTION 1. What is your full name, age, and post-office address?

ANSWER. Elias J. Olson [illegible] fra Oak Island [illegible]

QUESTION 2. Are you a native-born citizen [illegible] if so, in what State or Territory were you b[illegible] if native born and later naturalized in a [illegible]

ANSWER. No [illegible] not [illegible]

QUESTION 3. Are you the same person [illegible] Crookston [illegible] at the Crookston [illegible] 31st day of March [illegible] 1923, for the Lots 1 and 2 [illegible] 23; and lot 1, [illegible] Section 26, Township 68 N., Range 34 W., 5th Principal Meridian? If not, give relationship to entryman.

ANSWER. [illegible]

QUESTION 4. Are you married or single? ANSWER. Single

QUESTION 5. If married, of whom does your family consist?

ANSWER.

QUESTION 6. If a married woman, state whether your husband now has an unperfected homestead entry, and during what time he has resided on this land with you. Also state his citizenship qualifications. (See Note 1 at bottom of third page.)

ANSWER.

QUESTION 7. When did you first establish actual residence upon this land?

ANSWER. About April 5th 1923

QUESTION 8. When was your house built on this land?

ANSWER. I moved the house onto the land April 5th 1923

QUESTION 9. Have either you or your family ever been absent from the homestead since establishing residence?

ANSWER. [illegible]

QUESTION 10. If there has been such absence, give the dates covered by each absence; and as to each absence state whether you, your family, or both, were thus absent and the reason for each such absence.

ANSWER. None

216a

216b Question 11. Describe the land embraced in above entry by legal subdivisions, showing fully the character of same, and kind and amount of timber, if any.
Answer.

Subdivision	Acres cultivable	Acres timbered	Feet timber
Lots 1 and 2, Sec. 25, Similar	40	Balance, stony and, overflowed land, no timber.	
SW¼NW¼ Sec. 25	5	None—very stony	
Lot 1 Sec. 26	25	No timber—very stony.	
SE¼NE¼ Sec. 26	None	Very stony, no timber.	

Question 12. State the number of acres cultivated, kind of crop planted and amount harvested, each year.

Answer: 1923. I cleared 1 acre on the land I relinquished in 1925. I cut about 2 ton wild hay.

1924. I cleared 1 acre along east line; harvested 3 ton wild hay.

1925. I moved all my buildings to lot 1 Sec. 25 & cleared 3 acre and planted it to clover seed—harvested 5 ton hay.

1926. I cut out 2½ miles of road—cleared 9 acre. Sowed clover and garden ½ acre, harvested 5 ton mixed hay,

1927. I cleared no new land—sowed 5 acre of clover, harvested 5 ton hay and ½ acre of garden.

1928. I cleared 7 acre, sowed clover, harvested 6 ton mixed hay, also large garden.

Question 13. Describe fully and in detail the amount and kind of improvements and number of acres under cultivation on each subdivision. State total value of improvements on the claim.
Answer.

Subdivision	Character of improvements.
Lot 1 Sec. 25	7 acre cultivated, dwelling house, frame, 16x16, 1½ story high, log ice house 20x20—new, Twine house, log, 22x22, fish house, frame, 9x18,—well, 4 ft. sq. 7 ft. deep—1 dock 100 ft. long 4 ft. wide, log const. plank surface.
Lot 2 Sec. 25	1 dock 32 ft. x 8 ft. wide, long construction planked.
SW¼NW¼ Sec. 25	7a. cultivated.
Lot 1 Sec. 26	No clearing excepting road cut through.
SE¼NE¼ Sec. 26	7 acre cultivated. None excepting road cut through it.

Total value of improvements $1515.00.

Question 14. Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade or business?

Answer. No.

Question 15. Are there any indications of coal, salines, or minerals of any kind on the land? If so, describe what they are.

Answer. None.

Question 16. Have you sold, conveyed, or agreed to sell or convey any portion of the land? If so, to whom and for what purpose?

Answer. No.

Question 17. Have you optioned, mortgaged, or agreed to option or mortgage, or convey this land, or any part thereof? If so, when, to whom, and for what purpose and in what amount?

Answer. No.

[illegible] personal property of any kind elsewhere [illegible] describe the same and state where the same is kept.

ANSWER. [illegible]

QUESTION 19. Have you ever made any other homestead entry? If so, describe the same.

ANSWER. [illegible]

QUESTION 20. Have you, since August 30, 1890, made any entry or filing (not mineral) other than homestead? If so, describe the same by legal subdivisions, or by number, kind of entry, and office where made.

ANSWER. [illegible]

I wish to call your attention to the [illegible] suffered a very bad fire — lost my [illegible] & all its contents — also been on Nov 19 1929 and above mentioned buildings are the second set which I put on this land.

[illegible]
(Sign plainly, with full Christian name.)

NOTE 1.—If applicant is alien born, he should state the fact and file evidence of citizenship in due form, either a certificate of his own naturalization in a court of competent jurisdiction, or, if claiming to be a citizen by virtue of his father's naturalization and his own minority and residence in the United States at the date thereof, or, if a married woman claiming citizenship by virtue of her husband's nativity or naturalization, then record evidence of the naturalization of the father, or husband, or an affidavit as to the nativity of the latter. Applicants who were at one time citizens of the United States, but who later became citizens of a foreign country, must file record evidence of their naturalization. Any female citizen of the United States invoking the benefits of the act of October 17, 1914 (38 Stat., 740), shall make oath showing the nationality of her husband, and that he is entitled to become a citizen of the United States.

NOTE 2.—The officer before whom the proof is made will see that all answers are complete and responsive to the questions.

NOTE 3.—The officer before whom the deposition is taken should call the attention of the witness to section 128 of the U. S. Criminal Code (over), and state to him that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law.

I HEREBY CERTIFY that the deponent was examined separately and apart from the other witnesses in the case; that the foregoing deposition was read to or by deponent in my presence before deponent affixed signature thereto; that I verily believe deponent to be the identical person hereinbefore described, and that said deposition was duly subscribed and sworn to before me at my office, in [illegible] (Town, County, and State.) [illegible] within the [illegible] land district, this [illegible] day of June, 19[illegible]

[illegible]

[illegible]
(Official designation of officer.)

1396731

[illegible] OF HOMESTEAD CLAIMANTS.

I, [illegible], having made a Homestead Entry of the [illegible] [illegible], Section [illegible], Township [illegible], Range [illegible], [illegible] Meridian, subject to [illegible], under section [illegible] of the Revised Statutes of the United States, do now apply to [illegible] claim thereto by virtue of section No. [illegible] of the [illegible] of the United States; and for that purpose do solemnly [illegible] that I am a [illegible] (Native-born or naturalized.) [illegible] citizen of the United States; [illegible] actual settlement upon and have cultivated and resided [illegible] the 15th day of April, [illegible] time; that no part of said land has been alien- [illegible] in section 2288 of the Revised Statutes, but [illegible] fide owner as an actual settler; that I will [illegible] to the Government of the United States; and, fur- [illegible] heretofore perfected or abandoned an entry made [illegible] of the United States, except This [illegible] Aug 1st 1925

Elias Alfred Olson
(Sign plainly, with full Christian name.)

[illegible]—Every person swearing falsely to the above affidavit will be punished as provided by law [illegible] (See Sec. 125, U. S. Criminal Code, below.)

[illegible] CERTIFY that the foregoing affidavit was read to or [illegible] in my presence before affiant affixed signature thereto; [illegible] believe affiant to be a credible person and the [illegible] hereinbefore described, and that said affidavit [illegible] scribed and sworn to before me, at my office, in [illegible] Minnesota, this [illegible] (County and State.) of [illegible], 1927.

[illegible]

U.S. [illegible]

UNITED STATES CRIMINAL CODE.

Sec. 125. Whoever, having taken an oath before a competent tribunal, [illegible] imprisoned not more than five years.

219

105

4—[illegible]

Form approved by the Secretary of the Interior November 14, 19[illegible]

RECEIVED
U. S. LAND OFFICE
CASS LAKE MINNESOTA
Date June 8 [illegible]
Hour 9 [illegible]

DEPARTMENT OF THE INTERIOR.

HOMESTEAD ENTRY.

U. S. LAND OFFICE [illegible], No. 013608

FINAL PROOF.

TESTIMONY OF WITNESS.

QUESTION 1. What is your full name, age, and post-office address?

ANSWER. [illegible]

QUESTION 2. [illegible] name correctly given in the published notice?

ANSWER. [illegible]

QUESTION 3. [illegible] have you known the claimant in this case and the [illegible]

[illegible]

Township [illegible]

the land embraced [illegible]

[illegible]

ANSWER. [illegible]

QUESTION 4. Is entryman married? ANSWER [illegible]

QUESTION 5. Is said tract within the [illegible] used in any way for trade or business?

ANSWER. No

QUESTION 6. When did entryman settle [illegible]

ANSWER. [illegible] 1925

QUESTION 7. At what date did entryman [illegible] thereon?

ANSWER. about the middle [illegible]

QUESTION 8. Have entryman and family [illegible] homestead since thus establishing residence [illegible]

ANSWER. yes

QUESTION 9. Have entryman and family [illegible] stead since thus establishing residence [illegible]

ANSWER. No

QUESTION 10. If there have been any such absences, give the dates covered by such absences, stating who was absent and for what reason.

ANSWER. None

197

QUESTION 11. Describe the land embraced in above entry by legal subdivisions, showing fully the character of same, and kind and amount of timber, if any.

ANSWER.

Subdivision	Acres Cultivated	Post Office
Lot 6 sec 25	[illegible]	[illegible]
Lot 1 sec 25	[illegible]	[illegible]
Lot 6 sec 26	[illegible]	[illegible]
SE ¼ [illegible]	[illegible]	[illegible]

QUESTION 12. State the number of acres cultivated and kind of crop planted, each year.

ANSWER. 1923, 4a Cleared some land — kept one acre [illegible] to clover and

1924. 4a Cleared probably 2 acres more — at least 2 acres

1925. 4a Cleared 3 acres and planted clover seed on it

1926. Cleared 3 or 4 acres & planted Clover seed

1927. The [illegible] Cleared [illegible] showing but had [illegible]

1928. 4a Cleared & [illegible] Rye seed [illegible] 4a

1929. Now had [illegible] 10 acres Cleared & sowed to grass

QUESTION 13. Describe fully and in detail the amount and kind of improvements and number of acres under cultivation on each subdivision. State total value of improvements on the claim.

ANSWER.

Subdivision	
Lot 6 sec 25	1 or 2 acres cultivated, frame house 10x10 - 2 story high; log use barn 20x20; Land fenced 23 rods, 1 frame tobacco barn 2 [illegible] mill - built & [illegible] 1 [illegible] 1 [illegible] 1

QUESTION 16. Have you personal knowledge, from your own observation, that claimant and his family (if any) actually resided upon and cultivated this land each year in accordance with your above testimony?

ANSWER. [illegible]

QUESTION 17. How many times each year have you seen this land, and the claimant and his family residing thereon; and what other personal knowledge have you upon which your answers are based?

ANSWER. [illegible]

QUESTION 18. [illegible] in this claim, or related to the claimant? If so, [illegible]

ANSWER. [illegible]

[illegible]

[illegible] Note 1.—The officer before whom the proof is made [illegible] complete and responsive to the questions.

[illegible]

I [illegible] CERTIFY that the deponent was examined separately and apart from the other witnesses in the case; that the foregoing deposition was [illegible] by deponent in my presence before deponent affixed signature [illegible]; that I verily believe deponent to be the identical person [illegible] and [illegible] was duly subscribed [illegible]

[illegible]

(Name, county, and State.)

[illegible] land district,

[illegible], 19[illegible]

[illegible]

U.S. [illegible]

(Official designation of officer.)

UNITED STATES CRIMINAL CODE.

[illegible] on oath before a competent tribunal, officer, or person, in any case in which a law of the United [illegible] that he will testify, declare, depose, or certify truly, or that any written testimony, [illegible] subscribed, is true, shall willfully and contrary to such oath state or subscribe any mate- [illegible] is guilty of perjury, and shall be fined not more than two thousand dollars and [illegible]

Form approved by the Secretary of the [illegible]

DEPARTMENT OF THE INTERIOR

HOMESTEAD ENTRY.

U. S. LAND OFFICE [illegible] No. 013608

FINAL PROOF.

TESTIMONY OF WITNESS.

QUESTION 1. What is your full name, age, and post-office address?

ANSWER. [illegible] 27

[illegible] land [illegible]

QUESTION 2. Was your name correctly given in the published notice?

ANSWER. [illegible]

QUESTION 3. How long have you known the claimant in this case and the lots [illegible] 2, ~~[illegible]~~ sec 26, [illegible] lot 1 ~~[illegible]~~ Section 26, Township 68 N, Range 3 W, 5th Principal Meridian, the land embraced in Homestead Entry, No. Crookston 018 017 Crookston 013608, made at the Crookston Land Office?

ANSWER. eight years

QUESTION 4. Is entryman married? ANSWER. No

QUESTION 5. Is said tract within the limits of an incorporated town, or used in any way for trade or business?

ANSWER. No

QUESTION 6. When did entryman settle upon the homestead?

ANSWER. in April 1923

QUESTION 7. At what date did entryman establish actual residence thereon?

ANSWER. about the middle of April 1923

QUESTION 8. Have entryman and family resided continuously on the homestead since thus establishing residence thereon?

ANSWER. Yes

QUESTION 9. Have entryman and family ever been absent from the homestead since thus establishing residence thereon?

ANSWER. No

QUESTION 10. If there have been any such absences, give the dates covered by such absences, stating who was absent and for what reason.

ANSWER.

None

203

13 [illegible]

QUESTION 11. Describe [illegible] entry by legal subdivisions, showing fully [illegible] kind and amount of timber, if any.

ANSWER.

Subdivision.	Acres timbered.	Feet timber.
Lot 1 [illegible] 2 sec [illegible]	[illegible]	[illegible]
SW ¼ NW [illegible]	[illegible]	[illegible]
Lot 1 sec 2[illegible]	[illegible]	[illegible]
SE ¼ NE sec 2[illegible]	[illegible]	[illegible]

QUESTION 12. State the [illegible] kind of crop planted, each year.

ANSWER. 1923, Cleared [illegible]

1924, Cleared [illegible]

1925, Cleared [illegible] [illegible]

1926, Cleared [illegible] [illegible]

1927, Sowed [illegible] Clover

1928, Cleared [illegible] [illegible] Clover

19[illegible]

QUESTION 13. Describe [illegible] and kind of improvements and number of [illegible] each subdivision. State total value of improvements [illegible]

ANSWER.

Subdivision.	[illegible]
Lot 1 sec 25	[illegible]
Lot 2 sec 25	[illegible]
SW ¼ NW ¼ sec 25	[illegible]
Lot [illegible] sec 26	[illegible]
[illegible] NE ¼ sec 26	[illegible]

QUESTION 14. Are there any [illegible] on the land? If so, [illegible]

ANSWER. [illegible]

QUESTION 15. Have you any [illegible] that claimant has [illegible] to sell, [illegible] agreed to option [illegible] land? If so, give full details as to whom, for what [illegible] what amount.

[illegible]

224

205

QUESTION 16. Have you personal knowledge, [illegible] that claimant and his family (if any) actually [illegible] [illegible] this land each year in accordance with your [illegible]

ANSWER. yes

QUESTION 17. How many times each year have you [illegible] and the claimant and his family residing thereon; and what [illegible] knowledge have you upon which your answers are based?

ANSWER. once or twice per month I have land adjoining him

QUESTION 18. Are you interested in this claim, or related to the claimant? If so, how?

ANSWER. no

[illegible]
(Sign plainly, with full Christian name.)

NOTE 1.—The officer before whom the proof is made will see that all answers are complete and responsive to the questions.

[illegible] The officer before whom the deposition is taken should call the attention of the witness to section [illegible] [illegible] (below), and state to him that it is the purpose of the Government, if it be ascertained that he [illegible] him to the full extent of the law.

I HEREBY CERTIFY that the deponent was examined separately and apart from the other witnesses in the case; that the foregoing deposition was [illegible] or by deponent in my presence before deponent affixed signature [illegible]; that I verily believe deponent to be the identical person [illegible] before described, and that said deposition was duly subscribed [illegible] to before me at my office, in Oak Island, Lake of the Woods (Town, county, and State) Minnesota [illegible] the Cass Lake land district, [illegible] day of June [illegible]

Philip S. Smith
U. S. Commissioner
(Official designation of officer.)

UNITED STATES CRIMINAL CODE.

[illegible] Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United [illegible] oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, [illegible], or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material [illegible] which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and [illegible] not more than five years.

207

226 (Government Exhibit 18.)

(Filed in U. S. District Court on Feb. 13, 1931.)

United States
Department of the Interior
General Land Office
Cass Lake, Minnesota, January 15, 1931.

I, P. M. Larson, hereby certify that I am the Register of the United States Land Office at Cass Lake, Minnesota, and as such an official of the Department of the Interior of the United States Government, have no official seal.

That the following facts appear of record in the official records in my official custody in the United States Land Office, at Cass Lake, Minnesota;

That all the lands acquired by the United States under the Act of Congress of January 14, 1889, and bordering on the Lake of the Woods have been classified as agricultural lands;

That none of the lands acquired by the United States under the Act of Congress of January 14, 1889, in the Red Lake cession listed as Pine lands lie bordering on nor adjacent to the Lake of the Woods.

That all of the lands in the Northwest Angle, Lake of the Woods County, Minnesota, and on the mainland of Lake of the Woods County, Minnesota, and Roseau County, Minnesota, which lie landward of the shore line of the Lake of the Woods and within a distance of one township of such shore land are a part of the lands acquired by the United States under the Act of Congress of January 14, 1889, and all of the lands above-described are classified under said Act as agricultural lands.

P. M. LARSON,
Register.

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227 (Government Exhibit 19.)

(Filed in U. S. District Court on Feb. 13, 1931.)

United States
Department of the Interior
General Land Office

I, P. M. Larson, hereby certify that I am the Register of the United States Land Office at Cass Lake, Minnesota, and

as such an officer of the Department of the Interior of the United States Government;

That I have no official seal;

That the following facts appear of record in the official records in my official custody in the United States Land Office at Cass Lake, Minnesota:

1. With respect to such of those certain parcels of land described on the attached sheets numbered 1, 2, 3 and so much of sheet No. 4, as is included between the beginning of such sheet and the word and figure "total, 11,213.65" as lie in Roseau and Lake of the Woods Counties, except the northwest angle territory, were opened to homestead entry on October 13, 1898; and so much of the land last identified above as lie in the northwest angle territory of Lake of the Woods County were opened for homestead entry on June 15, 1904;

2. With respect to those certain parcels described on the attached sheets numbered 1, 2, 3, and so much of sheet No. 4 as is included between the beginning of such sheet and the word and figure "total, 11,213.65" as have set opposite the legal description of each parcel respectively the words "withdrawn from homestead entry by Executive Order April 28, 1928," or "withdrawn from homestead entry by Executive Order January 14, 1929," the right of entry thereon was withdrawn by the above described Executive Orders which were filed in my office on May 19, 1928, and January 26, 1929, respectively;

3. Title in fee to those certain tracts and parcels of land described on the attached sheets numbered 1, 2, 3, and so much of sheet number 4 as is included between the beginning of such sheets and the word and figure "total 11,213.65" and comprising in all 11,213.65 acres has been in the United States of America continuously according to the records in my official custody as Register of the United States Land Office, Cass Lake, Minnesota, from the dates hereinbefore specified on which the said lands were opened to homestead entry to date hereof, and between such dates no other person, form or government has had any right, title or interest therein according to the official records in my custody as Register of the United States Land Office at Cass Lake, Minnesota.

4. Title to and ownership of each of those certain tracts and parcels of land described on the attached sheets num-

bered 4, 5, 6 and 7 beginning on sheet numbered 4 with the heading "Lands to which title has reverted back to the United States by homestead entry cancellation between July 25, 1925, and May 4, 1929" have been continuously in the United States of America according to the records in my official custody as Register of the United States Land Office, Cass Lake, Minnesota, from the dates hereinbefore specified on which the said lands were opened to homestead entry to date hereof, and such title and ownership has been in fee except for the rights of persons who have entered thereon under the homestead laws of the United States; and the last homestead entry thereon was cancelled as to each parcel of land so described respectively on the date indicated immediately following each respective legal description.

5. That the acreage figure set opposite each legal description is the acreage shown as to each respective legal description by the official records under my custody as Register of the United States Land Office at Cass Lake, Minnesota.

I hereby set my hand under the three pages of this Certificate at Cass Lake, Minnesota, this seventh day of January, 1931.

P. M. LARSON, Register
U. S. Land Office,
Cass Lake, Minnesota.

... OF THE WOODS PAST DAMAGE CLAIMS

Lake stages, homestead entries and patents, tracts bordering Lake of the Woods in affected zone
(To accompany report to Chief of Engineers dated January

MAXIMUM AND MINIMUM LAKE STAGES IN THE MONTHS OF OPEN WATER (MAY 1st TO NOV. 1st) OF THE YEARS LISTED.				HOMESTEAD ENTRIES OF TRACTS AFFECTED BY LAKE OF THE WOODS FLOWAGE				AC	
Actual Levels		Computed nat. Levels		Tracts Ent'd		Cancellations		Total ac. under entry end of	
Year	Max.	Date	Min.	Date	Max.	Date	Min.	Date	No.	Acres	No.	Acres	Year	
1897	1062.3	8/1	1060.1	5/1	1061.1	8/1	1058.8	5/1	None	None	None	None	None	
1898	1059.9	11/1	1057.0	5/1	1058.5	10/15	1055.6	5/10	27	4058.20	None	None	4058.20	12
1899	1062.1	7/20	1059.8	5/1	1060.8	8/1	1057.0	5/1	11	1618.17	None	None	5676.37	5
1900	1062.0	11/1	1058.8	8/20	1058.5	11/1	1054.9	8/20	6	846.62	None	None	6522.99	1
1901	1061.4	7/15	1060.2	11/1	1059.6	7/15	1057.3	11/1	5	800.15	None	None	6857.34	
1902	1060.7	6/20	1059.2	5/1	1058.1	8/1	1055.4	5/1	15	1676.45	None	None	8065.79	4
1903	1061.4	6/1	1060.1	10/1	1058.6	6/10	1057.2	5/1	32	4848.30	1	40.00	12248.99	13
1904	1060.4	7/10	1059.0	5/1	1057.6	7/20	1056.0	5/1	10	1583.95	None	None	11021.39	3
1905	1062.1	8/20	1058.4	5/1	1059.9	9/20	1055.4	5/1	13	1691.96	1	40.00	10458.08	5
1906	1061.5	5/1	1059.7	11/1	1058.4	7/10	1056.8	11/1	7	973.90	None	None	9179.65	
1907	1062.1	10/20	1058.6	5/1	1058.1	10/20	1055.8	5/1	7	737.05	None	None	8205.56	1
1908	1061.4	6/20	1060.0	11/1	1058.2	7/10	1057.1	11/1	8	1149.42	None	None	7806.28	3
1909	1060.1	11/1	1058.8	5/1	1056.1	11/1	1055.0	5/1	8	789.80	None	None	7072.03	3
1910	1061.5	5/1	1058.3	11/1	1057.1	5/1	1054.3	11/1	11	1226.90	None	None	5384.53	3
1911	1057.6	7/1	1056.8	9/20	1055.3	7/1	1053.2	5/1	9	1094.13	3	164.50	4618.59	6
1912	1060.8	11/1	1057.8	5/1	1055.6	10/10	1053.5	5/1	15	1734.25	2	80.00	5629.22	6
1913	1061.1	5/10	1060.1	10/1	1056.0	8/10	1054.8	5/1	7	946.10	None	None	6402.57	2
1914	1061.4	6/17	1060.3	5/1	1056.5	7/20	1054.7	5/1	16	2218.16	None	None	7559.14	13
1915	1061.8	7/10	1060.2	11/1	1056.9	7/20	1055.1	5/1	19	2393.14	2	232.40	8914.88	16
1916	1064.0	7/1	1060.7	11/1	1060.6	7/10	1058.0	5/1	18	2218.70	1	40.00	8874.48	7
1917	1059.8	7/20	1059.2	5/1	1056.9	5/1	1054.6	11/1	11	953.47	None	None	8951.30	5
1918	1060.6	8/1	1059.3	5/1	1054.7	7/10	1054.1	5/1	21	2353.02	None	None	8799.24	19
1919	1061.9	7/10	1059.8	11/1	1057.3	8/10	1054.6	5/1	20	2104.02	2	80.00	7993.51	11
1920	1060.1	6/10	1059.2	11/1	1057.4	7/1	1056.1	11/1	15	1763.09	4	321.45	6497.45	10
1921	1059.9	5/1	1059.1	11/1	1056.1	6/10	1055.1	11/1	10	689.50	3	355.30	5686.52	2
1922	1060.6	5/20	1059.1	10/20	1056.7	7/20	1055.5	5/1	17	1314.49	9	1034.57	4413.25	1
1923	1060.4	5/20	1059.0	11/1	1055.9	7/1	1054.4	11/1	21	2186.49	2	210.40	5349.94	11
1924	1057.9	5/20	1056.2	11/1	1053.6	5/10	1052.9	11/1	25	2207.05	5	290.47	6791.95	3
1925	1058.8	7/20	1056.2	5/1	1055.7	7/1	1054.0	5/1	6	483.17	6	483.65	6522.72	
1926	1060.8	7/10	1059.8	5/1	1056.3	11/1	1054.0	5/1	3	37.90	None	None	5549.86	3
1927	1062.9	6/1	1060.4	11/1	1061.0	7/10	1059.0	11/1	6	622.08	3	299.45	5322.41	2
1928	1061.3	7/10	1060.0	5/1	1057.6	8/1	1056.2	5/1	3	196.60	9	626.72	4816.77	
1929	1059.8	5/1	1057.8	11/1	1056.5	5/10	1054.0	11/1	None	None	20	1685.18	2773.47	
									None	None	8	1011.07	919.75	

...E OF THE WOODS PAST DAMAGE CLAIMS

...acts bordering Lake of the Woods in affected zone wholly or in part below lake stage 1064 ...ompany report to Chief of Engineers dated January 2, 1931).

...OF OPEN ...STED.	HOMESTEAD ENTRIES OF TRACTS AFFECTED BY LAKE OF THE WOODS FLOWAGE					AC. BELOW: 1064 ENTERED EACH YEAR. LATER PATENTED:	TRACTS PASSED TO PRIVATE OWNERSHIP BY PATENT			ACRES OWNED BY U. S. AFFECTED AREA END OF YEAR
Levels	Tracts Ent'd.		Cancellation		Total ac. under entry end of Year				Total ac. end of year	
Min.	Date	No.	Acres	No.	Acres		No.	Acres		
55.8	5/1	None	None	None	None	None	None	None	None	55,029.44
55.6	5/10	27	4068.20	None	None	4068.20	1395.85	None	None	None	50,971.24
57.0	5/1	11	1618.17	None	None	5676.37	530.90	None	None	None	49,353.07
54.9	5/20	6	846.62	None	None	6522.99	198.60	None	None	None	48,506.45
57.3	11/1	5	800.15	None	None	6857.54	97.70	4	465.80	465.80	47,706.30
55.4	5/1	15	1676.45	None	None	8065.79	422.30	3	468.00	933.80	46,029.85
57.8	5/1	32	4848.30	1	40.00	12248.99	1317.35	4	625.10	1558.90	41,221.55
56.6	5/1	10	1583.95	None	None	11021.39	332.40	18	2811.55	4370.45	39,637.60
55.4	5/1	13	1691.96	1	40.00	10439.08	584.80	15	2234.27	6604.72	37,985.64
54.8	11/1	7	973.90	None	None	9179.65	99.30	15	2233.35	8838.07	37,011.74
55.8	5/1	7	737.05	None	None	8205.56	193.10	12	1711.12	10549.19	36,274.69
57.1	11/1	8	1149.42	None	None	7206.26	348.20	15	2148.70	12697.89	35,125.27
55.0	5/1	8	789.80	None	None	7072.03	395.15	6	923.45	13621.34	34,336.07
54.3	11/1	11	1226.90	None	None	5384.53	363.30	20	2974.40	16595.74	33,109.17
53.2	5/1	9	1094.13	3	164.50	4618.59	666.90	11	1635.57	18231.31	32,179.54
53.5	5/1	15	1734.25	2	80.00	5629.22	678.70	5	643.62	18874.93	30,525.29
54.8	5/1	7	946.10	None	None	6402.57	237.00	2	172.75	19047.68	29,579.19
54.7	5/1	16	2218.16	None	None	7359.14	1368.10	9	1261.59	20309.27	[illegible]
55.1	5/1	19	2393.14	2	232.40	8914.88	1616.40	6	605.00	20914.27	25,800.29
58.0	5/1	18	2218.70	1	40.00	8874.48	705.90	18	2219.10	23133.37	23,021.59
54.6	11/1	11	953.47	None	None	8951.30	548.50	7	876.65	24010.02	22,068.12
54.1	5/1	21	2353.02	None	None	8799.84	1949.40	20	2505.08	26515.10	19,715.10
54.6	5/1	20	2104.02	2	80.00	7993.51	1153.40	20	2829.75	29344.85	17,691.08
56.1	11/1	15	1763.09	4	321.45	6497.45	1023.40	23	2937.70	32282.55	16,249.44
55.1	11/1	10	689.50	3	355.30	5686.52	358.80	12	1145.13	33427.68	15,918.24
55.5	5/1	17	1314.49	9	1034.57	4413.25	172.90	18	1553.19	34980.87	15,635.32
54.4	11/1	21	2186.49	2	210.40	5349.94	1150.25	12	1039.40	36020.27	13,659.23
52.9	11/1	25	2207.05	5	290.47	6791.95	374.40	7	474.57	36494.84	11,742.65
54.0	5/1	6	483.17	6	463.65	6522.72	42.10	3	288.75	36783.59	11,723.13
54.0	5/1	3	57.90	None	None	5549.86	31.60	9	1010.76	37794.35	11,685.33
59.0	11/1	6	622.08	3	299.45	5322.41	228.10	10	550.08	38344.43	11,368.60
56.2	5/1	3	196.80	9	626.72	4816.77	69.70	3	75.52	38419.95	11,792.72
54.0	11/1	None	None	20	1685.18	2773.47	None	4	358.12	38778.07	13,477.90
		None	None	9	1011.07	919.75	None	7	842.65	39620.72	14,486.97

Year	Max.	Date	Min.	Date	Max.	Date	Min.	Date	No.	Acres	No.	Acres	Fy end of Year	
1897	1062.3	6/1	1060.1	5/1	1061.1	6/1	1058.8	5/1	None	None	None	None	None	
*1898	1059.9	11/1	1057.0	5/1	1058.5	10/15	1055.6	5/10	27	4058.20	None	None	4058.20	1
1899	1062.1	7/20	1059.8	5/1	1060.8	6/1	1057.0	5/1	11	1618.17	None	None	5676.37	
1900	1062.0	11/1	1058.8	6/20	1058.5	11/1	1054.9	6/20	6	846.62	None	None	6522.99	
1901	1061.4	7/15	1060.2	11/1	1059.6	7/15	1057.3	11/1	5	800.15	None	None	6857.54	
1902	1060.7	6/20	1059.2	5/1	1058.1	6/1	1055.4	5/1	15	1676.45	None	None	8065.79	
1903	1061.4	6/1	1060.1	10/1	1058.6	6/10	1057.2	5/1	32	4848.30	1	40.00	12248.99	1
*1904	1060.4	7/10	1059.0	5/1	1057.6	7/20	1056.0	5/1	10	1583.96	None	None	11021.39	
1905	1062.1	6/20	1059.4	5/1	1059.9	9/20	1055.4	5/1	13	1691.96	1	40.00	10429.08	
1906	1061.5	5/1	1059.7	11/1	1058.4	7/10	1054.8	11/1	7	973.90	None	None	9179.65	
1907	1062.1	10/20	1058.6	5/1	1058.1	10/20	1055.2	5/1	7	737.05	None	None	8205.56	
1908	1061.4	6/20	1060.0	11/1	1058.2	7/10	1057.1	11/1	8	1149.42	None	None	7206.28	
1909	1060.1	11/1	1058.8	5/1	1056.1	11/1	1055.0	5/1	8	789.80	None	None	7072.03	
1910	1061.5	5/1	1058.3	11/1	1057.1	5/1	1054.3	11/1	11	1226.90	None	None	5384.53	
1911	1057.6	7/1	1056.8	9/20	1055.3	7/1	1053.2	5/1	9	1094.13	3	164.50	4618.59	
1912	1060.8	11/1	1057.8	5/1	1055.6	10/10	1053.5	5/1	15	1734.25	2	80.00	5629.22	
1913	1061.1	5/10	1060.1	10/1	1056.0	8/10	1054.8	5/1	7	946.10	None	None	6402.57	
1914	1061.4	6/17	1060.3	5/1	1056.5	7/20	1054.7	5/1	16	2218.16	None	None	7359.14	13
1915	1061.8	7/10	1060.2	11/1	1056.9	7/20	1055.1	5/1	19	2393.14	2	232.40	8914.88	16
1916	1064.0	7/1	1060.7	11/1	1060.6	7/10	1058.0	5/1	18	2218.70	1	40.00	8874.48	7
1917	1059.8	7/20	1059.2	5/1	1056.9	5/1	1054.6	11/1	11	953.47	None	None	8951.30	5
1918	1060.6	8/1	1059.3	5/1	1054.7	7/10	1054.1	5/1	21	2353.02	None	None	8799.24	19
1919	1061.9	7/10	1059.8	11/1	1057.3	8/10	1054.6	5/1	20	2104.02	2	80.00	7993.51	11
1920	1060.1	6/10	1059.2	11/1	1057.4	7/1	1056.1	11/1	15	1763.09	4	321.45	6497.45	10
1921	1059.9	5/1	1059.1	11/1	1056.1	6/10	1055.1	11/1	10	689.50	3	355.30	5686.52	2
1922	1060.6	5/20	1059.1	10/20	1056.7	7/20	1055.5	5/1	17	1314.49	9	1034.57	4413.25	1
1923	1060.4	5/20	1059.0	11/1	1055.9	7/1	1054.4	11/1	21	2186.49	2	210.40	5349.94	11
1924	1057.9	5/20	1056.2	11/1	1053.6	5/10	1052.9	11/1	25	2207.06	5	290.47	6791.95	3
1925	1058.8	7/20	1056.2	5/1	1055.7	7/1	1054.0	5/1	6	483.17	6	463.65	6522.72	
1926	1060.8	7/10	1059.8	5/1	1056.3	11/1	1054.0	5/1	3	57.90	None	None	5549.86	
1927	1062.9	6/1	1060.4	11/1	1061.0	7/10	1059.0	11/1	6	622.08	3	299.45	5522.41	2
1928	1061.3	7/10	1060.0	5/1	1057.6	8/1	1056.2	5/1	3	198.60	9	626.72	4816.77	
1929	1059.8	5/1	1057.8	11/1	1056.5	5/10	1054.0	11/1	None	None	20	1685.18	2773.47	
1930									None	None	9	1011.07	919.75	
								Totals -	400	47515.63	82			125

*Lands south shore of lake opened for settlement October 3, 1898.

‡Lands Northwest Angle and south shore of lake opened for settlement October 3, 1898 and June 15,

1. International Joint Commission started investigation on regimen of lake levels, holding first h
Minnesota, September 18, 1912.

2. Final report filed by International Joint Commission on June 12, 1917.

3. Remaining public lands in affected area withdrawn from homestead entry by Executive Orders date

Min.	Date	Entries: No.	Entries: Acres	Cancellations: No.	Cancellations: Acres	Entry end of Year	PATENTED: No.	PATENTED: Acres	Forfeited: No.	Forfeited: Acres	Total ac. end of year	Entry END OF YEAR
1055.8	5/1	None	None	None	None	None	None	None	None	None	None	55,029.44
1055.6	5/10	27	4058.20	None	None	4058.20	1595.65	None	None	None	None	50,971.24
1057.0	5/1	11	1618.17	None	None	5676.37	530.90	None	None	None	None	49,353.07
1054.9	8/20	6	846.62	None	None	6522.99	198.60	None	None	None	None	48,506.45
1057.3	11/1	5	800.15	None	None	6857.54	97.70	4	465.80	465.80	47,706.30	
1055.4	5/1	15	1676.45	None	None	8065.79	422.30	3	468.00	933.80	46,029.85	
1057.8	5/1	32	4848.30	1	40.00	12848.99	1317.35	4	625.10	1558.90	41,221.55	
1056.9	5/1	10	1583.95	None	None	11021.39	332.40	18	2811.55	4370.45	39,637.60	
1055.4	5/1	13	1691.96	1	40.00	10459.08	584.80	15	2234.27	6604.72	37,965.64	
1054.8	11/1	7	973.90	None	None	9179.65	99.30	15	2233.35	8838.07	37,011.74	
1055.8	5/1	7	737.05	None	None	8205.56	193.10	12	1711.12	10549.19	36,274.69	
1057.1	11/1	8	1149.42	None	None	7206.28	348.20	15	2148.70	12697.89	35,125.27	
1055.0	5/1	8	789.80	None	None	7072.03	395.15	6	923.45	13621.34	34,336.07	
1054.3	11/1	11	1226.90	None	None	5324.53	363.30	20	2974.40	16595.74	33,109.17	
1053.2	5/1	9	1094.13	3	164.50	4618.59	666.90	11	1635.57	18231.31	32,179.54	
1053.5	5/1	15	1734.25	2	80.00	5629.22	678.70	5	643.62	18874.93	30,525.29	
1054.8	5/1	7	946.10	None	None	6402.57	237.00	2	172.75	19047.68	29,579.19	
1054.7	5/1	16	2218.16	None	None	7359.14	1368.10	9	1261.59	20309.27	[illegible]	
1055.1	5/1	19	2393.14	2	232.40	8914.88	1616.40	6	605.00	20914.27	25,200.29	
1058.0	5/1	18	2218.70	1	40.00	8874.48	705.90	18	2219.10	23133.37	23,021.59	
1054.6	11/1	11	953.47	None	None	8951.30	548.50	7	876.65	24010.02	22,068.12	
1054.1	5/1	21	2353.02	None	None	8799.84	1949.40	20	2505.08	26515.10	19,715.20	
1054.6	5/1	20	2104.02	2	80.00	7993.51	1153.40	20	2829.75	29344.85	17,691.08	
1056.1	11/1	15	1763.09	4	321.45	6497.45	1023.40	23	2937.70	32282.55	16,249.44	
1055.1	11/1	10	669.50	3	355.30	5686.52	358.20	12	1145.13	33427.68	15,915.24	
1055.5	5/1	17	1314.49	9	1034.57	4413.25	172.90	18	1553.19	34980.87	15,635.32	
1054.4	11/1	21	2186.49	2	210.40	5349.94	1150.25	12	1039.40	36020.27	13,659.23	
1052.9	11/1	25	2207.05	5	290.47	6791.95	374.40	7	474.57	36494.84	11,742.65	
1054.0	5/1	6	483.17	6	483.65	6522.72	42.10	3	288.75	36783.59	11,723.13	
1054.0	5/1	3	37.90	None	None	6549.86	31.60	9	1010.76	37794.35	11,685.83	
1059.0	11/1	6	622.08	3	299.45	6522.41	228.10	10	550.08	38344.43	11,368.60	
1056.2	5/1	3	198.60	9	626.72	4816.77	69.70	3	75.52	38419.95	11,792.72	
1054.0	11/1	None	None	20	1685.18	2773.47	None	4	358.12	38778.07	13,477.90	
		None	None	9	1011.07	919.75	None	7	842.65	39620.72	14,486.97	
Totals -		400	47515.63	82			18537.88	312				

ement October 3, 1898.
ke opened for settlement October 3, 1898 and June 15, 1904.
vestigation on regimen o. lake levels, holding first hearing at Warroad, Minnesota,

Commission on June 12, 1917.
thdrawn from homestead entry by Executive Orders dated April 28, 1928 and January 14, 1929.

228

Government Exhibit 25.
(Filed in U. S. District Court Feb. 13, 1931.)

229 (Government Exhibit 29.)

(Filed in U. S. District Court on Feb. 13, 1931.)

Warranty Deed

Llyod Henry Harrison, a single man to Harry Brewster.

Filed for record the 4 day of April A. D. 1923, at 11 o'clock A. M.

HANS B. IMSDAHL, Register of Deeds.

This Indenture, Made this 14th day of February in the year of our Lord, one thousand nine hundred and twenty three, between Lloyd Henry Harrison, a single man, of the County of Lake of the Woods and State of Minnesota, party of the first part, and Harry Brewster of the County of Lake of the Woods and State of Minnesota, party of the second part;

Witnesseth, That the said party of the first part, for and in consideration of the sum of Fifteen hundred and no/100 Dollars, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does hereby Grant, Bargain, Sell and Convey to the said party of the second part, his heirs and assigns, Forever, all that tract or parcel of land lying and being in the County of Lake of the Woods and State of Minnesota, described as follows, to-wit:

Lot two (2) of Section two (2), and lots one (1), two (2) and three (3) of Section three (3) in Township one hundred sixty five (165), North, and lots two (2) and three (3) of Section thirty four (34) and lots three (3) and four (4) of Section thirty five (35) in Township one hundred sixty six (166) North, all in Range thirty five (35) West of the fifth principal meridian, Minnesota, containing one hundred sixty and five hundredths acres, be the same more or less, according to the United States Government survey thereof.

Revenue Stamp $1.50 cancelled.

To Have and to Hold the Same, Together with all hereditaments and appurtenances thereunto belonging, or in anywise appertaining, unto the said party of the second part, his heirs and assigns, Forever. And the said Lloyd Henry Harrison, party of the first part, for himself and his heirs, executors and administrators, does covenant with the said party of the second part, his heirs and assigns, that he is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same in manner and form aforesaid,

and that the same are free from all encumbrances except none, and the above bargained and granted lands and premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part will Warrant and Defend.

In Testimony Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

LLOYD HENRY HARRISON (Seal)

Signed, Sealed and Delivered in Presence of
Bert Hanson
Wm. Walt

230 State of Minnesota, County of Roseau—ss.

On this 14th day of February A. D. 1923, before me a Notary Public within and for said County, personally appeared Lloyd Henry Harrison, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

(Notarial Seal) BERT HANSON, Bert Hanson
Notary Public, Roseau Co., Minn.
My commission expires Sept. 11, 1928.

Endorsements.

I hereby certify that the taxes for the year 1922 on within described lands are paid.

JOHN F. CLARK, Treasurer
Lake of the Woods County. E. N.

Taxes paid and transfer entered this 4th day of April, 1923.

M. D. WEEKS,
Auditor.

231 Register's Certificate of Copy of Record

State of Minnesota, County of Lake of the Woods—ss.

I, Hans B. Imsdahl, Register of Deeds in and for said County and State aforesaid, do hereby certify that I have compared the foregoing and attached paper in writing, consisting of one sheet, and purporting to be a copy of that certain Warranty Deed given by Lloyd Henry Harrison, a single man, to Harry Brewster, and filed for record on the 4th day of April A. D. 1923, at 11 o'clock A. M., as Instrument Num-

ber 411 with the original record thereof, as recorded in Book 3 of Deed Record at page 42 of the public records now remaining in my said office, and that the same is a true and correct transcript of the original record of said instrument and the whole thereof.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal, at the Village of Baudette, Minnesota in said County, this 20th. day of December, A. D. 1930.

(Seal)

HANS B. IMSDAHL,
Register of Deeds.

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232 (Government Exhibit 33.)

(Filed in U. S. District Court on Feb. 13, 1931.)

Deed Record No. 47
Instrument No. 54473

.....

To .....

Beltrami County, Minnesota.

Filed for record the 18 day of Aug. A. D., 1915, at 10 o'clock a. m., (page) 465 C. O. Moon, Register of Deeds, by H. D....., deputy.

Taxes paid and transfer entered this 18 day of Augt. A. D., 1915; J. L. George, County auditor, H. W. Alsop

This Indenture, made this 12th day of August, in the year of Our Lord one thousand nine hundred and fifteen, between Richard C. Edwards and Edith V. Edwards, his wife, parties of the first part, and John R. Morris and William F. Steffes, parties of the second part,

Witnesseth, That the said parties of the first part, in consideration of the sum of twelve hundred & 00/100 Dollars, to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, do hereby Grant, Bargain, Sell, and Convey unto said parties of the second part, their heirs and assigns, Forever, all those tracts or parcels of land lying and being in the county of Beltrami and state of Minnesota, described as follows, to-wit:

The northeast quarter of the southeast quarter (NE¼-SE¼) and the southeast quarter of the southeast quarter (SE¼-SE¼) of Section seventeen (17) and the Lot five (5)

of Section sixteen (16) in Township one hundred sixty-two (162) north of Range thirty-two (32) west of the fifth principal meridian, Minnesota, containing one hundred nineteen and twenty-five hundredths (119.25) acres, according to the United States government survey thereof.

(I. R. Stamp $1.50 cancelled)

To Have And To Hold The Same, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, unto the said parties of the second part, their heirs and assigns, Forever. And the said Richard C. Edwards and Edith V. Edwards his wife, parties of the first part, for their heirs, executors, and administrators, do covenant with the said parties of the second part, ...heirs and assigns, that they are well seized in fee of the lands and premises aforesaid, and ha.. good right to sell and convey the same in manner and form aforesaid, and that the same are free from all encumbrances; and the above bargained and granted lands and premises in the quiet and peaceable possession of the said parties of the Second part, their heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said parties of the first part will Warrant And Defend.

In Testimony Whereof, The said parties of the first part have hereunto set their hands and seals the day and year first above written.

RICHARD C. EDWARDS, (Seal)
EDITH V. EDWARDS. (Seal)

Signed, sealed, and delivered in presence of:
Morris Willett, G. A. Soderstrom

State of Minnesota,
County of Beltrami—ss.

On this 12th day of August, A. D. 1915, before me, a notary public within and for said county, personally appeared Richard C. Edwards and Edith V. Edwards, his wife, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

(Notarial Seal) MORRIS WILLETT,
Notary Public, Beltrami County.

My commission expires June 10th, 1922.

233 State of Minnesota,
County of Lake of the Woods—ss.

I, Hans B. Imsdahl, Register of Deeds in and for said County and State aforesaid, do hereby certify that I have compared the foregoing and attached paper in writing consisting of one sheet and purporting to be a copy of that certain Warranty Deed given by Richard C. Edwards and wife to John R. Morris, et al., and filed for record in the office of the Register of Deeds, Beltrami County, Minn., on the 18 day of Aug. A. D., 1915, at 10 o'clock a. m. and duly recorded in Book 47 of Deed Record on page 465 as Instrument No. 54473 and later by reason of County Division was transcribed into Book F of Deeds, page 501, Lake of the Woods County, Minnesota, record, with the transcribed record thereof, as recorded in Book F of Deeds at page 501 of the public records now remaining in my said office, and that the same is a true and correct transcript of the transcribed record of said instrument and the whole thereof.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal, at the Village of Baudette, Minnesota in said County, this 24th day of December, A. D. 1930.

(Notarial Seal) HANS B. IMSDAHL,
Register of Deeds.

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234 (Government Exhibit 40.)

(Filed in U. S. District Court on Feb. 13, 1931.)

Deed of Administrator.

No. 3572.

This Indenture, Entered into this sixth day of June 1925, by and between Andrew Johnson as Administrator of the Estate of John Hagen party of the first part, and Andreas Strandenas, of the County of Lake of the Woods State of Minnesota party of the second part, Witnesseth, That the said party of the first part, having been thereunto authorized and empowered by the order of license made and filed in the Probate Court of Lake of the Woods County, Minnesota, on the 25th day of May 1925, in the matter of the estate of the above-named John Hagen, having made and filed in said court the bond and oath required by law and said order of license, having given the notice of sale and published the same as required by law and said order of license, having complied in all respects with the terms and conditions of said order of

license, having, at the time and place specified therefor in said notice of sale, offered the real estate hereinafter described for sale at public auction to the highest bidder and sold the same to such highest bidder, to-wit: to Andreas Strandenas the party of the second part hereto for the sum of Six Hundred Dollars, having made and filed in said Probate Court due report of said sale, and said court having confirmed said sale by its order in said matter made and filed on the fifth day of June 1925; does, pursuant to said order of license and said order of confirmation and in consideration of the sum of Six Hundred ($600.00) Dollars to him in hand paid, the receipt of which is hereby acknowledged, hereby Grant, Bargain, Sell and Convey unto said party of the second part, his heirs and assigns, that tract of land lying in the County of Lake of the Woods State of Minnesota, described as follows, to-wit:

Northeast quarter of the northeast quarter (NE¼ NE¼) Section Twenty Nine (29) Township One Hundred Sixty Two (162) North of Range Thirty two (32) West of the 5th Principal Meridian, Minnesota, containing 40 acres more or less according to the United States Government survey thereof

To Have And To Hold, The above granted land and premises unto said party of the second part, his heirs and assigns, Forever.

In Witness Whereof, Said party of the first part has hereunto set his hand and seal the day and year first above written.

(Revenue Stamp $1.00 Cancelled)

ANDREW JOHNSON, (Seal)
As Administrator of the Estate of
John Hagen.

Signed, Sealed and Delivered
in Presence of:
H. C. Hanson.
C. C. Ortman.

State of Minnesota,
County of Lake of the Woods—ss.

On this sixth day of June 1925, before me personally appeared Andrew Johnson, administrator of the Estate of John Hagen to me known to be the person described in and

who executed the foregoing instrument and acknowledged he executed the same as his free act and deed.

(Notarial Seal)

H. C. HANSON,
H. C. Hanson,
Notary Public, Lake of the Woods County, Minn.

My Commission expires February 17th, 1929.

Filed for record on the 6th day of June, A. D., 1925 at 5:30 o'clock P. M.

HANS B. IMSDAHL,
Register of Deeds.

I hereby certify that the taxes for the year 1924 on within described lands are paid.

JOHN F. CLARK,
Treasurer Lake of the Woods County.

Taxes paid and transfer entered this 6th day of June, A. D., 1925.

M. D. WEEKS,
County Auditor.

235 State of Minnesota,
County of Lake of the Woods—ss.

I, Hans B. Imsdahl, Register of Deeds in and for said County and State aforesaid, do hereby certify that I have compared the foregoing and attached paper in writing, consisting of one sheet, and purporting to be a copy of that certain Deed of Administrator given by Andrew Johnson, As Administrator of the Estate of John Hagen to Andreas Strandenas, and filed for record on the 6th day of June, A. D., 1925 at 5:30 o'clock P. M., as Instrument Number 3572, with the original record thereof, as recorded in Book 1 of Deed Record at page 307 of the public records now remaining in my said office, and that the same is a true and correct transcript of the original record of said instrument and the whole thereof.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal, at the Village of Baudette, Minnesota, in said County, this 22nd day of December, A. D., 1930.

(Notarial Seal)

HANS B. IMSDAHL,
Register of Deeds.

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236 (Government Exhibit 50.)

(Filed in U. S. District Court on Feb. 13, 1931.)

This Indenture, Made this 10th day of August, in the year of our Lord one thousand nine hundred twenty-one, between

Alfred F. Green, an unmarried man, of the County of Roseau and State of Minnesota, party of the first part, and Randor G. Karlson, of the County of Roseau and State of Minnesota, party of the second part;

Witnesseth, That the said party of the first part, in consideration of the sum of one and No/100 Dollars, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does hereby Grant, Bargain, Sell, Remise, Release, Quit-Claim and Convey unto the said party of the second part, his heirs and assigns, Forever, all the following tracts or parcels of land lying and being in the County of Roseau and State of Minnesota, described as follows, to-wit:

Lots one (1), two (2) and the southwest quarter of the northeast quarter (SW¼NE¼) of section five (5) in township one hundred sixty-two (162) North of Range thirty-five (35) west of the 5th principal meredian, containing 123.65 acres of land, be the same more or less, according to the United States Government survey thereof,

To Have and to Hold, the above Quit-Claimed premises, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, unto the said party of the second part, his heirs and assigns, Forever,

In Testimony Whereof, The said party of the first part has hereunto set his hand and seal the day and year first above written.

ALFRED F. GREEN (Seal)

Signed, Sealed and Delivered in Presence of
Alexander Fosmark
Bert Hanson

237 State of Minnesota,
County of Roseau—ss.

On this 10th day of August, A. D. 1921, before me, a U. S. Commissioner, District of Minnesota, within and for said County, personally appeared Alfred F. Green, an unmarried man, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

ALEXANDER FOSMARK,
U. S. Commissioner, District of Minnesota.

(U. S. Comm.)
(Seal)

#71376 Quit-Claim Deed Alfred F. Green to Randor G. Karlson Office of Register of Deeds County of Roseau, Minn. I hereby certify that the within Instrument was filed in this office for record on the 5th day of December A. D. 1921, at 1 o'clock P. M., and was duly recorded in Book 127 of Deeds on page 205 J. A. Burkee, Register of Deeds. Taxes paid and transfer entered this 5 day of December, 1921 S. G. Bertilrud County Auditor. I hereby certify that the taxes for the year 1920 on the lands described within are paid. Paul Wallin County Treasurer.

238 I, J. A. Burkee, Register of Deeds in and for the County of Roseau and State of Minnesota, do hereby certify that the annexed written instrument is a full, true, and perfect copy of that certain Quit Claim Deed recorded in Book 127 on page 205 of the records of the Register of Deeds of above County and State, which records are in my custody as such officer.

Witness my signature and official seal this 22 day of December, A. D. 1930.

J. A. BURKEE,
(Seal) Register of Deeds in and for Roseau County, Minn.

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239 United States Government Exhibit No. 60.

Certified Exhibits to Accompany Division 1 of Canada's Representation.

240 List of Exhibits.
Division I.

Number

Statement by I. R. Strome re Shoreline of Lake of the Woods.

Letter from L. V. Rorke to J. T. Johnston, dated Dec. 3, 1929, re lands granted in Ontario at Nov. 30, 1920.

Statement by W. S. Gliddon re lands granted in Manitoba at Sept. 21, 1915.

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241 Estimate of Short Line Mileages around Lake of the Woods.

In the following tabulation the miles of shore line around the mainland and of Lake of the Woods and of the islands of

one mile or more in diameter, have been scaled from the standard map of the Lake of the Woods watershed issued in 1916 with the Report of the Consulting Engineers, on the Lake of the Woods levels to the International Joint Commission.

In addition to the main shore line and the said larger islands there are some 10,000 smaller islands scattered throughout the northern portion of the lake. These islands have been estimated at an average diameter of about 85 feet and shore line of 264 feet or a collective shore line amounting to some 500 miles.

The mileages determined as per the foregoing are as follows:

	Shore Line Mileage.		
I. In Canada			
(a) In Ontario			
Mainland	875		
Mouth of Rainy River to Baudette	12	887	
Islands one mile or over in diameter		663	
Small islands estimated 10,000 in number		500	
Total for Ontario			2050
(b) In Manitoba			
Mainland			35
Total for Canada			2085
242	Shore Line Mileage.		
II. In United States			
Mainland			115
Islands			25
Total for United States			140
Grand Total			2225

Note: The shore line of the Indian Reserves as included in the above is 250 miles.

Sgd. I. ROY STROME,
Asst. Engineer of the Canadian Lake of the Woods Control Board.
15th Jan., 1931.

Sgd. J. T. Johnston,
Witness.

243 Affidavit.

Dominion of Canada,
Province of Ontario
County of York

To Wit:

I, Greta E. M. Stork, Stenographer, of the City of Toronto, County of York, make oath and say:—

That I know L. V. Rorke, the Surveyor-General and Deputy Minister whose signature is on the attached letter, dated December 3rd. 1929, to J. T. Johnston, Director of the Dominion Water Power and Reclamation Service.

That I know the said L. V. Rorke's signature.

That the signature on the attached letter is a true photostat copy.

GRETA E. M. STORK.

Sworn before me in the City of Toronto, this 8th day of January, A. D. 1931.

F. E. TITUS,
(Notarial Seal) A Notary Public for Ontario.

244 Ontario

Department of Surveys.

Toronto, December 3rd, 1929.

Dear Mr. Johnston,

Replying to your letter of the 30th ult., in which you wish to be advised as to the number of parcels of land disposed of on the shore of Lake of the Woods within the Province of Ontario, prior to the 30th November 1920, when a reservation was placed on further sales or leases of lands for flooding rights to elevation 1064, I find that the number of such leases or patents, according to a rough count from our plans, is 725. This is made up as follows:—

Islands in northerly part of Lake of the Woods and parcels on the mainland adjoining.	500
Islands and parcels of mainland in the westerly part of Lake of the Woods including Shoal Like.	150
Mainland parcels in the townships of Morson, McCrosson and Spohn, District of Rainy River.	41
Locations on the mainland at Keewatin and Kenora, formerly Rat Portage.	32
	723

While the above represents the number of patents granted, you will note that the 32 parcels granted in Kenora and Keewatin have since been subdivided and into town lots and smaller parcels, and I assume that each individual owner would present a claim for damages, and it would not be confined to 32 as above mentioned.

245 Trusting this information is sufficient for your requirements,

I am,

Yours truly,
L. V. RORKE,
Surveyor General, Deputy Minister.

LVR/VS.

J. T. Johnston Esq., Director,
The Dominion Water Power & Reclamation Services,
81, Metcalfe Street,
Ottawa. Ontario.

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246 Canada,
Province of Ontario—To-wit:

I, FRANK WILLIAM CHAMBERS CUMING, of the City of Ottawa, in the Province of Ontario, Civil Servant, make oath and say:

1. That I was personally present and did see William Searle Bliddon, named in the within instrument, who is personally known to me to be the person named therein, duly sign, seal and execute the same for the purposes named therein.

2. That the same was executed at the City of Ottawa, in the Province of Ontario, Canada, aforesaid, and that I am the subscribing witness thereto.

3. That I know the said William Searle Gliddon and is in my belief of the full age of twenty-one years.

(Sgd.) F. W. C. CUMING.

Sworn to at the City of Ottawa, in the Province of Ontario, this 15th day of January, A. D. 1931, Before me,

(Sgd.) K. R. DALY,
A commissioner for Oaths in and for the Province of Ontario.

(Seal)
Kenneth R. Daly,
Notary Public in and for Ontario.

247 Department of the Interior
Dominion Lands Administration

Take Notice that I, William Searle Gliddon, of the City of Ottawa, in the County of Carleton, Province of Ontario and Dominion of Canada, Esquire, Registrar of Dominion Lands Patents, hereby certify that according to the records of the Dominion Lands Administration no parcel of land in the Province of Manitoba have been patented by the Crown covering lands bordering on the southern shores of the Lake of the Woods in the Province of Manitoba.

(Sgd.) WM. S. GLIDDON,
Registrar of Dominion Lands Patents.

Dated at the City of Ottawa, in the Province of Ontario, this 15th day of January, A. D. 1931.

Witness:
(Sgd.) F. W. C. CUMING.

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248 Government Exhibit No. 61.

Certified Exhibits to Accompany Division II of Canada's Representation

249 List of Exhibits

Division II.

Number.

Lac Seul Conservation Act, 1928.

Manitoba Natural Resources Act, 1930.

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250 Division II.

Ownership of a large part of the shorelands by the Province of Ontario.

Extracts from Pertinent Acts

1. Schedule of agreement of 28th day of February 1928 accompanying the Lac Seul Conservation Act, 1928.

Preamble. "Whereas the Crown in the right of the Province of Ontario is the owner of the lands under and bordering on Lac Seul in the District of Kenora in the Province of Ontario and also of all ungranted lands under and bordering on the rivers and waters flowing into and out of said lake in

the Province of Ontario, and the water powers and water power sites connected therewith;

"And whereas the Crown in the right of the Dominion of Canada is the owner of all ungranted lands under the waters of the Winnipeg River in the Province of Manitoba and the water powers and water power sites connected therewith and has leased certain of such power sites to companies and others who have developed the same in whole or in part;

"And whereas there are a number of water powers and water power sites at the outlet of Lac Seul and upon the English and Winnipeg Rivers between that lake and the Provincial Boundary between the Provinces of Ontario and Manitoba, all of which powers are vested in the Crown in the right of the Province of Ontario and none of which has as yet been developed;

"And whereas it is desirable to construct a regulating dam at Lower Ear Falls at the outlet of Lac Seul for the purpose of increasing the capacity of the power plants already erected and that may hereafter be erected on the Winnipeg River in the Province of Manitoba;

"And whereas the erection of a dam at Lower Ear Falls will facilitate the development of power at that point, and be of advantage in the development of power at other power sites on the waters flowing out of Lac Seul between Lower Ear Falls and said Provincial Boundary;

"And whereas Canada has requested Ontario to erect a dam at the location and for the purposes aforesaid, and has offered to contribute towards the cost of the construction and maintenance of the same, and Ontario has agreed so to do subject to the terms, stipulations, conditions and reservations hereinafter contained."

Paragraph 2. "Ontario shall construct a dam for the purposes of conservation, regulation and power at Lower Ear Falls at the outlet of Lac Seul on lands owned by the Crown in the right of the Province of Ontario which said dam
251 shall be absolutely owned, controlled and operated by Ontario and neither of the other parties hereto shall have any ownership in, title to or authority or control over it."

Paragraph 5. "Three-fifths of the capital cost of said dam shall be paid, and borne by Canada and two-fifths by Ontario, said proportions being approximately equivalent to the difference in the mean water elevation between said Provincial Boundary and Lake Winnipeg, and between the present mean water level of Lac Seul and the said Provincial Boundary."

Paragraph 7. "After the said dam has been completed and put in operation the total interest on the capital cost apportioned to and contributed by Ontario under the provisions of paragraph 5 hereof shall be paid annually at the rate of five per centum per annum by Canada to Ontario, subject to the provision in the next succeeding paragraph hereof contained."

Paragraph 10. "The cost of maintenance and operation of said dam shall be wholly paid by Canada until powers on said waters have been developed and put to use. As such powers are developed and put to use, Ontario shall pay that proportion of two-fifths of the cost of such maintenance and operation that the head so developed and used on said waters bears to the total developable head thereon. When and so soon as the total developable head on said waters has been fully developed and put to use, Canada shall bear three-fifths and Ontario two-fifths of the cost of said maintenance and operation."

2. Agreement of November 15, 1922 between Ontario, Manitoba and Canada, ratified by the Manitoba Natural Resources Act.

Preamble. "This agreement, as a working basis for the regulation of the English and Winnipeg rivers, is entered into on the understanding that all parties are agreeable to the repeal of the Lake of the Woods Regulation Act 1921, but Ontario does not bind itself to the terms of this agreement in the event of that Act not being repealed."

252 Government Exhibit No. 62.

Certified Exhibits to Accompany Division V of Canada's Representation

253 List of Exhibits

Division V.

	Number.
British North America Act, 1867.	
Manitoba Act, 1870.	
Dominion Lands Act.	
Manitoba Natural Resources Act.	
Indian Act.	
Ontario Public Lands Act.	

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254 Division V.

The shore lands are subject to four (now five) separate governmental jurisdictions, three of which are in Canada namely, the Dominion, Ontario and Manitoba.

Extracts from Pertinent Acts.

1. The British North America, Act, 1867. (Imperial.)

Preamble. "Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual admission into the Union of other Parts of British North America."

Distribution of Legislative Powers.

Section 91. "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Com-

mons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

1. The Public Debt and Property.

2. The Regulation of Trade and Commerce.

9. Beacons, Buoys, Lighthouses and Sable Island.

10. Navigation and Shipping.

12. Sea Coast and Ireland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

24. Indians, and Lands reserved for the Indians."

255 Section 92. "In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

13. Property and Civil Rights in the Province."

Section 109. "All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same."

2. The Manitoba Act, 1870. (Dominion.)

Section 30. "All ungranted or waste lands in the Province shall be, from and after the date of the said transfer, vested in the Crown, and administered by the Government of Canada for the purposes of the Dominion, subject to, and except and so far as the same may be affected by, the conditions and

stipulations contained in the agreement for the surrender of Rupert's Land by the Hudson's Bay Company to Her Majesty."

3. The Dominion Lands Act. (Dominion.) (Ch. 113 R. S. C. 1927.)

Section 3. "Except as provided by this or any other Act of the Parliament of Canada, this Act applies,

(a) to the lands of the Dominion of Canada in the provinces of Manitoba, Saskatchewan and Alberta, and in the Northwest Territories of Canada;

(b) to the three and one-half million acres of land in that portion of the Peace River district of British Columbia, lying east of the Rocky Mountains and adjoining the province of Alberta, granted to the Crown, as represented by the Government of Canada, by section 7, chapter 14 of the British Columbia Statutes of 1884, 1908, c. 20, s. 3."

4. The Manitoba Natural Resources Act. (Dominion.) (20-21 Geo. V. c. 29.)

Article 1. "In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the British North America Act, 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall, from and after the coming into force of this agreement, and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to
256 any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals or royalties before the coming into force of this agreement, and that the Prov-

ince shall not be liable to account to Canada for any such payment made thereafter."

5. The Indian Act. (Dominion.) (Ch. 98 R. S. C. 1927.)

Section 4. "The Minister of the Interior, or the head of any other department appointed for that purpose by the Governor in Council, shall be the Superintendent General of Indian Affairs, and shall, as such, have the control and management of the lands and property of the Indians in Canada."

Section 19. "All reserves for Indians, or for any band of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as they were held heretofore, but shall be subject to the provisions of this Part."

Section 54. "All Indian lands which are reserves or portions of reserves surrendered, or to be surrendered, to His Majesty, shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part."

6. The Public Lands Act. (Ontario.) (Ch. 35 R. S. O. 192.)

Section 2. "The Department of Lands and Forests shall be presided over by the Minister of Lands and Forests and shall have the management, sale and disposition of the public lands and forests."

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257 Government Exhibit No. 63.

Certified Exhibits to Accompany Division VI of Canada's Representation.

258 List of Exhibits.

Division VI.

Number.

British North America Act, 1867.

Navigable Waters Protection Act.

Boundary Waters Treaty of 1909.

The International Boundary Waters Treaty Act.

259 Division VI.

The Lake of the Woods is a navigable water and hence subject to Federal Control.

Extracts from Pertinent Acts &c.

1. The British North America Act, 1867.

Section 91. "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,—

10. Navigation and Shipping."

2. The Navigable Waters Protection Act. (c. 140 R. S. C.) first passed in 1927.

Section 2 (b). " 'work' includes any bridge, boom, dam, aboiteau, wharf, dock, pier or other structure, tunnel or pipe, or telegraph or power cable or wire and the approaches or other works necessary or appurtenant thereto, or any work, structure or device, whether similar in character to the foregoing or not, which may interfere with navigation."

Section 4. "No work shall be built or placed in, upon, over, under, through or across any navigable water unless the site thereof has been approved by the Governor in Council, nor unless such work is built, placed and maintained in accordance with plans and regulations approved or made by the Governor in Council.

2. The provisions of this section shall not apply to small wharves or groynes or other bank or beach protection works, or boat-houses, if in the opinion of the Minister of Public Works

(a) they do not interfere with navigation, and

(b) do not cost more than one thousand dollars."

3. Boundary Waters Treaty of 1909.

Preliminary Article. "For the purposes of this Treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of

Canada passes, including all bays, arms, and inlets thereof,
but not including tributary waters which in their nat-
260 ural channels would flow into such lakes, rivers, and
waterways, or waters flowing from such lakes, rivers,
and waterways, or the waters of rivers flowing across the
boundary."

Article 3. "It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a Joint Commissioner, to be known as the International Joint Commission.

The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbours, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes."

4. An Act relating to the establishment and expenses of the International Joint Commission under the Waterways Treaty of January the Eleventh, Nineteen Hundred and Nine. (1-2 George V. C. 28).

Section 1. "The treaty relating to the boundary waters and to questions arising along the boundary between Canada and the United States made between His Majesty and the said United States signed at Washington the eleventh day of January, one thousand nine hundred and nine, and the protocol of the fifth day of May, one thousand nine hundred and ten, in the Schedule to this Act, are hereby confirmed and sanctioned."

Section 2. "The laws of Canada and of the several provinces thereof are herey amended and altered so as to permit, authorize and sanction the performance of the obligations undertaken by His Majesty in and under the said treaty; and so as to sanction, confer and impose the various rights, duties and disabilities intended by the said treaty to be conferred or imposed or to exist within Canada."

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261 Government Exhibit No. 64.

Certified Exhibits to Accompany Division VII of Canada's Representation.

262 List of Exhibits.

Division VII.

Number

Agreement of June 22, 1898, between Keewatin Power Co. and the Crown.

Dominion Order in Council of Jan. 21, 1919.

Ontario Order in Council of Feb. 13, 1919.

Lake of the Woods Regulation Act, 1921.

Dominion Order in Council of Sept. 21, 1921.

Lac Seul Conservation Act, 1928.

Lake of the Woods Control Board Act, 1921.

Proclamations bringing into effect Lake of the Woods Control Board Act, 1921, and Lac Seul Conservation Act, 1928.

Lake of the Woods Control Board Act, 1922.

Lac Seul Conservation Act 1928.

Proclamation bringing into effect Lake of the Woods Control Board Act, 1922, and Lac Seul Conservation Act, 1928.

Dominion Order in Council, dated June 20, 1928.

Ontario Order in Council, dated June 27, 1928.

Lake of the Woods Treaty of 1925.

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263 Division VII.

The Lake of the Woods Outlets have been continuously controlled by the Governments of Ontario and the Dominion from 1898 to date.

Extracts from Pertinent Agreements, Acts, &c.

1. Agreement between the Crown in the right of Ontario and Keewatin Power Company dated June 22, 1898.

"This Agreement, made the 22nd day of June, A. D. 1898; between The Keewatin Power Company, hereinafter called the Company of the First Part, and Her Majesty, represented herein by the Commissioner of Public Works, hereinafter caller the Commissioner, of the Second part.

"Whereas the Company have constructed a dam across the west branch of the Winnipeg River at Tunnel Island at or near the Lake of the Woods.

"And whereas for the purpose of improving the navigation of the said lake, it is expedient that the said dam should be improved by the addition of stop logs and otherwise.

"And whereas it has been agreed by and between the parties hereto that in consideration of the sum of Four Thousand Dollars and other stipulations and conditions herein contained, that the said Company will make all the necessary improvements and will also permit the same to be used for the improvement of such navigation as aforesaid.

Now this Indenture Witnesseth as follows:—

The Company further covenant and agree that the Commissioner shall have the right to regulate the height of the water and to control the dam as may be necessary."

2. Dominion Order in Council Establishing Lake of the Woods Control Board Dated January 21, 1919.

"The Minister, therefore, recommends that a Board, to be known as the 'Lake of the Woods Control Board' be constituted, to consist of four qualified civil engineers, two to represent the Dominion of Canada, and two to represent the province of Ontario.

"The powers and duties of the Lake of the Woods Control Board shall be:—

"(1) To see that all the works and all power canals in the outlet from the lake, including the headgates and by-passes,

shall be so operated as to maintain the level of the Lake of the Woods as nearly as may be, between 1056 and 1061, United States Coast and Geodetic Survey datum.

"(5) To from time to time confer with any municipalities, companies, bodies or persons affected by or interested in the regulation of the levels of the Lake of the
264 Woods respecting any matter arising from such regulation and to from time to time hear and receive any complaints, or representations from such municipalities, companies, bodies or persons respecting such regulation.

"(7) In addition to controlling the outflow for the maintenance of the level of the lake as set forth above, to cause the works to be so operated as to furnish the largest dependable flow of water from the lake to secure navigation in the Winnipeg River and to the advantage of the water powers of the Winnipeg River between Lake of the Woods and Lake Winnipeg and other interests both on the lake and in the Winnipeg River."

3. Ontario Order in Council establishing Lake of the Woods Control Board dated February 13, 1919.

"The Committee therefore advise that * * * be appointed to said Board to represent the Province of Ontario in compliance with the aforesaid Order of the Privy Council."

4. The Lake of the Woods Control Board Act, 1921. (Dominion).

Section 3. "It shall be the duty of the Board to secure severally and at all times the most dependable flow and the most advantageous and beneficial use of the waters of the Winnipeg river; * * * and for these purposes the Board shall have power,—

"(a) To regulate and control the outflow of the waters of the Lake of the Woods so as to maintain the level of the lake between the elevations that have been recommended by the International Joint Commission in their final report of the 12th June, 1917, or between such elevations as may be agreed upon by the United States and Canada."

Section 4. "In addition to any other legal or other proceedings that may be taken to enforce any order of the said Board, every person violating or refusing to obey any order of the said Board, or obstructing or preventing the carrying out and enforcement of any order made by the said Board shall be liable, upon summary conviction, to a fine not

exceeding one thousand dollars, or to imprisonment for a period not exceeding three months, or to both such fine and imprisonment, and shall also be liable to a further penalty not exceeding five hundred dollars for each day on or during which any such offense continues or is repeated."

Section 5. "The said Board shall have all the powers necessary for effectively carrying out the authority and control vested in it by this Act and by any Act passed by the Legislature of the Province of Ontario, and any order
265 made by the said Board may be made a rule, order or decree of the Exchequer Court of Canada or of the Supreme Court of Ontario, and shall be enforced in the same manner as any rule, order or decree may be enforced in the Court in which such proceeding is taken.

Section 6. (1) When any person or corporation neglects or refuses to obey or carry out any order of the Board, the Board in addition to any other remedy provided by this Act, may from time to time enter upon and take such complete or partial possession of any mill, dam, plant, works, machinery, land, waters or premises, and may do all such acts and things, as the Board may deem necessary for the due enforcement and carrying out of such order, and may retain possession and control of any such mill, dam, plant, works, machinery, land, waters or premises for such period as the Board may deem necessary for that purpose.

(2) All expenses incurred by the Board under subsection one of this section shall constitute a debt due from such person or corporation to the Board and shall be recoverable by the Board with costs in any court of competent jurisdiction.

5. The Lake of the Woods Control Board Act. 1922. (Ontario)

Section 3. "It shall be the duty of the Board to secure severally and at all times the most dependable flow and the most advantageous and beneficial use of the waters of the Winnipeg river; ..... and for these purposes the Board shall have power,—

"(a) To regulate and control the outflow of the waters of the Lake of the Woods so as to maintain the level of the lake between the elevations that have been recommended by the International Joint Commission in their final report of the 12th June, 1917, or between such elevations as may be agreed upon by the United States and Canada."

Section 4. "In addition to any other legal or other proceedings that may be taken to enforce any order of the said Board, every person violating or refusing to obey any order of the said Board, or obstructing or preventing the carrying out and enforcement of any order made by the said Board shall be liable, upon summary conviction, to a fine not exceeding $1,000, or to imprisonment for a period not exceeding three months, or to both such fine and imprisonment and to a further penalty not exceeding $500 for each day on or during which any such offense shall continue or be repeated."

Section 5. "The said Board shall have all the powers necessary for effectively carrying out the authority and control vested in it by this Act and by any Act passed by the Parliament of the Dominion of Canada and any order made by the said Board may be made a rule, order or decree of the Exchequer Court of Canada or of the Supreme Court of Ontario, and shall be enforced in the same manner as any rule, order or decree may be enforced in the court in which such proceeding is taken.

266 Section 6. (1) "Where any person or corporation neglects or refuses to obey or carry out any order of the Board, the Board in addition to any other remedy provided by this Act, may from time to time enter upon and take such complete or partial possession of any mill, dam, plant, works, machinery, land, waters or premises, and may do all such acts and things as the Board may deem necessary for the due enforcement and carrying out of such order, and may retain possession and control of any such mill, dam, plant, works, machinery, land, waters or premises for such period as the Board may deem necessary for that purpose.

(2) All expenses incurred by the Board under subsection 1 of this section shall constitute a debt due from such person or corporation to the Board, and shall be recoverable by the Board with costs in any court of competent jurisdiction."

6. The Lake of the Woods Regulation Act, 1921. (Dominion).

Section 2. "All dams, structures and other works of whatsoever description which have heretofore been or may hereafter be constructed in upon, over, about or across,—

(a) any outlet of the Lake of the Woods,

(b) the Winnipeg River at or above its junction with English River, or

(c) English River at the outlet of and below Lac Seul, which do or may or can in anywise control, regulate or affect the outflow of water from the said lakes, or either of them, or the natural levels of the water in the said lakes, or either of them, at any time, or the natural flow of the water in the Winnipeg River or in English River, at any time, are and each of them is declared to be for the general advantage of Canada.

Section 3 (1) "The Governor in Council shall have power to make and enforce such regulations as he may from time to time consider necessary, advisable or expedient to require, prescribe and ensure that the aforesaid works and each of them shall at all times be constructed, maintained, improved, repaired and operated in such manner as,—

(a) to secure at all times the most dependable flow and the most advantageous and beneficial use of the waters of the Winnipeg River and of the English River severally;

(b) to regulate and control the outflow of the waters of the Lake of the Woods so as to maintain the level of the said lake between the elevations recommended by the report of the International Joint Commission of 12th June, 1917, or between such elevations as may be agreed upon by the United States and Canada, and so that the obligations, relating to the level of the Lake of the Woods, of Canada, or any of the Provinces of Canada, as part of the British Dominions beyond the seas, toward the United States, arising out of treaty made or to be made between His Majesty the King of the United Kingdom of Great Britain and Ireland
267 and of the British Dominions beyond the seas, Emperor of India, and the United States, may be duly performed;"

Section 4. "Any person who owns, controls, or has in possession any of the dams, structures or works aforesaid, or who directs the construction, operation, repair, alteration or management thereof, shall if he contravene or fail, neglect or refuse to obey or comply with any of the regulations aforesaid, or any order, direction, or requirement competently made or issued and communicated to him thereunder, be guilty of an offense and liable therefor, upon summary conviction, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment: Provided that if the offender be a body corporate the fine may be for a sum not exceeding five

thousand dollars; and moreover, in either case, the offender shall be liable to a further penalty, not exceeding in the case of an individual five hundred dollars, and in the case of a body corporate two thousand dollars, for each day upon or during which any such offense shall continue or be repeated."

Section 5. Any person who wilfully resists, obstructs, hinders, or prevents, or attempts wilfully to resist, obstruct, hinder or prevent the carrying out or enforcement of any such regulation, shall be liable, upon summary conviction, to a fine not exceeding one thousand dollars, and to imprisonment for a term not exceeding three months, or to both such fine and imprisonment, and shall also be liable to a further penalty not exceeding five hundred dollars for each day upon or during which any such offense shall continue or be repeated."

Section 6. "Moreover the Exchequer Court of Canada shall have jurisdiction to enforce compliance with this Act, or with any regulation made thereunder, by appropriate judgment or order in any action brought upon information of the Attorney General of Canada against any person or body corporate from whom compliance is due, or who is charged with the obligation to comply, or who is by this Act or any such regulation made subject to a penalty for non-compliance."

Section 7. (1) "The Governor in Council shall have power to appoint a Board consisting of four members, of whom three shall form a quorum, and such inspectors and other officers and employees as he may deem necessary or advisable to aid in the administration and for the purpose of enforcing the provisions of this Act and any regulations made thereunder.

7. Dominion Order in Council, issued under authority of the Lake of the Woods Regulation Act, 1921, reappointing the four members of the original Lake of the Woods Control Board, dated September 21, 1921.

"The Minister, therefore, recommends that pursuant to the Lake of the Woods Regulation Act, 1921, the four
268 members of the original Board be reappointed in their present capacities, but in view of Clause 1 of Section 7 of the Lake of the Woods Regulation Act that three shall form a quorum of the Board, that provision only of the Order in Council dated 21st January, 1919, whereby the Chairman of the original Board had a casting vote in case of a tie be rescinded;

"The Minister further recommends that such Lake of the Woods Control Board shall be charged with the responsibility of,—

(a) The administration and enforcing of the provisions of the Lake of the Woods Regulation Act;

(b) The preparation for the approval of the Governor in Council of such regulations as the Board may from time to time consider necessary to carry out the provisions of the said Act."

8. The Lac Seul Conservation Act, 1928. (Dominion.)

Section 3. "The Lake of the Woods Regulation Act, 1921, chapter thirty-eight of the statutes of 1921, is repealed."

9. Proclamation of Governor in Council bringing into effect the Lake of the Woods Control Board Act, 1921, dated June 20, 1928.

"Now Therefore Know Ye that by and with the advice of Our Privy Council for Canada We do hereby proclaim and direct that the said the Lake of the Woods Control Board Act, 1921, shall come into force on the thirtieth day of June in the year of Our Lord one thousand nine hundred and twenty-eight."

10. Dominion Order in Council appointing the Dominion members of the Lake of the Woods Control Board under authority of the Lake of the Woods Control Board Act, 1921, dated June 20, 1928.

"The Minister, therefore, recommends that Mr. J. T. Johnston, Director of the Dominion Water Power and Reclamation Service of the Department of the Interior, and Mr. K. M. Cameron, Chief Engineer, of the Department of Public Works, be appointed Dominion members of the Lake of the Woods Control Board, as from June 30, 1928; that their positions on the Board continue to be as set out in the Order in Council of May 19, 1925, (P. C. 729), by which they were designated Dominion members of the Board under the authority of the Lake of the Woods Regulation Act, 1921, (to be repealed as above stated on the date of their new appointment); and that their duties and responsibilities as members of the Board be as set out,—

269 (a) in the Lake of the Woods Control Board Act, 1921, including the preparation for the approval of the Governor General in Council and the Lieutenant Gov-

ernor in Council, of such regulations as the Board may from time to time consider necessary to carry out the provisions of the said Act as provided in section 10 thereof."

11. Ontario Order in Council appointing the Ontario members of the Lake of the Woods Control Board under authority of the Lake of the Woods Control Board Act, 1922, dated June 27, 1928.

"The Minister recommends that Thomas Henry Hogg, of the City of Toronto, of the County of York, Chief Hydraulic Engineer of the Hydro-Electric Power Commission of Ontario, and Louis Valentine Rorke of the said City of Toronto, of the County of York, Surveyor-General of the Department of Lands and Forests, be appointed as Members, representing the Province of Ontario, of the Lake of the Woods Control Board as and from June 30th, 1928, with duties and responsibilities as set out in the said Lake of the Woods Control Board Act, 1922, including the preparation for approval of such regulations as the Board may, from time to time, consider necessary to carry out the provisions of the said Act as provided therein, and as provided for by the Lac Seul Conservation Act, 1928."

12. Lake of the Woods Convention signed February 24, 1925.

Article 3. "The Government of Canada shall establish and maintain a Canadian Lake of the Woods Control Board, composed of engineers, which shall regulate and control the outflow of the waters of the Lake of the Woods.

There shall be established and maintained an International Lake of the Woods Control Board composed of two engineers, one appointed by the Government of Canada and one by the Government of the United States from their respective public services, and whenever the level of the lake rises above elevation 1061 sea-level datum or falls below elevation 1056 sea-level datum the rate of total discharge of water from the lake shall be subject to the approval of this Board."

270 Government Exhibit No. 65.

Certified Exhibits
to Accompany
Supplement to Division VII
of
Canada's Representation

271 List of Exhibits.

Supplement to Division VII.

Number.

Agreements of Dec. 11, 1924, between Keewatin Power Company and the Minister of the Interior of Canada.

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272 Supplement to Division VII.

Control Over Outlets.

As a supplement to the contentions made in the argument presented under Division VII immediately preceding, and as indicating further how drastically the Dominion Government insisted upon retaining control over the lake outlets, reference might be made to the agreement entered into between His Majesty the King represented by the Minister of the Interior of the Dominion Government, and the Keewatin Power Company, dated December 11, 1924, covering the reconstruction of the Norman Dam, the construction of the power station located in and forming part of the dam, and the enlargement of the Western Outlet, all by the Keewatin Power Company in accordance with plans approved by the Dominion Government and with the Dominion Government contributing towards the cost of the outlets enlargement and of the reconstruction of the control dam.

The Government insisted upon control of the works either by the control board or by an officer of the Department and incorporated ample provisions for enforcing such control.

Paragraph 52 (a) of the Agreement provided that the Contractor covenants and agrees that "the Minister shall by means of the Lake of the Woods Control Board or by any officer of the Department of the Interior or of the Board ..... at all times in the future control and operate the works as hereinafter defined for the purpose of securing to the public the most dependable flow and the most advantage-

ous use of the waters of the Winnipeg River, and for the regulation and control of the outflow of the waters of Lake of the Woods so as to maintain the level of the said lake between the elevations recommended by the report of the International Joint Commission of the 12th June, 1917, or between such elevations as may be agreed upon by the United States and Canada so that any obligations relating to
273 the level of Lake of the Woods, of Canada or of any of the Provinces of Canada as part of the British Dominions beyond the seas, towards the United States, arising out of treaty made or to be made between His Majesty and the United States may be duly performed; and the Minister or the Lake of the Woods Control Board as the case may be shall be the sole judge of what is necessary to be done for the purposes aforesaid."

Paragraph 52 (b) provided that "The Contractor further covenants and agrees that the control exercisable by the Minister as hereinbefore provided shall be exclusive and that its right to use water for the development of power and to utilize the works and the power-house proposed to be constructed thereon shall be subject to the right of the Minister to control for the purposes aforesaid, and that for the purposes of such control the Minister may do any thing relating to the construction, operation and improvement of the works, as may in his judgment be necessary or proper for the purposes hereof, and the Contractor covenants and agrees to facilitate the Minister in all respects in the exercise of such control and in the doing of anything relating to the construction, operation and improvement of the works aforesaid."

Paragraph 52 (c) provided that "The Contractor further covenants that it has a good and indefeasible title to the works and that it is entitled to grant, and does hereby grant, to His Majesty for the purposes of control and all other powers and authority vested in the Minister or to which he is entitled, a license and easement for access to and to enter upon all and singular, that certain parcel or tract of land and premises, situate, lying and being in the vicinity of the Town of Kenora, District of Kenora, and Province of Ontario, and being composed of the land and lands under the water of the West Branch of the Winnipeg River, South of Tunnel Island,

and containing by admeasurement, twelve (12) acres,
274 be the same more or less, and which said parcel of land may be more particularly described as follows."

From the foregoing it will be noted that the Dominion Government—not content with the sanctions embodied in the Lake of the Woods Control Board Acts 1921 and 1922 ("Concurrent legislation)—further embodied in the agreement entered into with the Keewatin Power Company for the actual enlargement of the Western Outlet and for the reconstruction of the Norman Control Dam, the following express conditions:

1. That the Minister shall by means of the Lake of the Woods Control Board or by any officer of the Department of the Interior, at all times in the future control and operate the works as defined (i. e. both the control dam and the power house) for the purpose of securing to the public the most dependable flow and the most advantageous use of the waters of the Winnipeg River, etc., etc.

2. That the control by the Minister shall be exclusive and that the company's rights to use water for the development of power and to use the works and the power house shall be subject to the right of the Minister to control the flow for the purposes aforesaid.

3. That the Minister is granted, for the purposes of control, a license and easement for access to the lands and premises upon which the works are located.

It might be added that by a supplementary agreement between His Majesty and the Keewatin Power Company, also dated December 11, 1924, exactly similar provisions were agreed upon governing the control of the Company's power plant in the Eastern Outlet and of the flow of the water through the same.

275 It is apparent therefore that in the two agreements entered into between His Majesty and the Keewatin Power Company having to do with the two structures controlling the outflow through the Western and Eastern Outlets of the lake respectively (i. e. the outlets through which the outflow is 95% controlled) the use of water for power purposes was completely subordinated to the maintenance of a regulated flow "designed for securing to the public the most dependable flow and most advantageous use of the waters of the Winnipeg River."

A certified copy of the Agreement between His Majesty and the Keewatin Power Company dated 11th December, 1924, covering the Western Outlet is submitted as Exhibit #65.

A certified copy of the Agreement between His Majesty and the Keewatin Power Company, dated 11th December 1924, covering the Eastern Outlet is submitted as Exhibit #65.

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276 Government Exhibit No. 66.

Certified Exhibits to Accompany Division VIII. of Canada's Representation.

277 List of Exhibits.

Division VIII.

Number

Dominion Lands Act

Letters, J. B. Challies to Deputy Minister, dated Sept. 1, 1915.
Agent of Dominion Lands to J. B. Challies, dated Sept. 21, 1915.
J. B. Challies to N. O. Cote, dated Feb. 24, 1916.
F. S. Checkley to J. B. Challies, dated April 7, 1916.

Dominion Order in Council of March 27, 1922.

Ontario Public Lands Act.

Letters, J. B. Challies to Beniah Bowman, dated Nov. 24, 1920.
Beniah Bowman to J. B. Challies, dated Nov. 30, 1920.
L. V. Rorke to J. T. Johnston, dated Nov. 27, 1929.

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278 Division VIII.

Large tracts of Canadian Lands were withdrawn from acquisition by private parties beginning 1915.

Extracts from Pertinent Acts &c.

1. Dominion Lands Act. (Dominion) (ch. 113 R. S. C. 1927)

Section 78. "The Minister may set aside and reserve from entry for homestead or from sale as agricultural lands, any

lands which he considers to be unsuited for cultivation without the aid of irrigation, or to be required in connection with out the aid of irrigation, or any marsh lands, or lands suitable for grazing but not adapted to agriculture, or lands valuable on account of the hay or timber, quarriable stone, salt, petroleum, natural gas, coal, gold, silver, copper, iron, or other minerals thereon or therein, or for the protection of ponds, lakes or other water supplies, or for the purposes of a water power, harbour, landing or townsite: Provided that the Minister may, at any time, on being satisfied that there is no longer reason for continuing the reservation of any lands so reserved, after due notice given, remove the reservation and declare the land open to entry for homestead or for sale as agricultural lands."

2. Letter from J. B. Challies to the Deputy Minister, dated September 1, 1915.

"In connection with the consideration by the Lake of the Woods Technical Board of the Lake of the Woods Reference before the International Joint Commission, the question has arisen as to the advisability of the Department of the Interior allowing settlement in available land in the Province of Manitoba, contiguous to the Lake of the Woods.

"As it is possible that the level of the Lake of the Woods will be held at an elevation which will cause considerable flooding along the margins of this Lake in the Province of Manitoba, it is urgent that the damage caused thereby should be as low as possible. If the territory in question is allowed to be homesteaded, it might be necessary to pay considerable sums for land improvements. I have therefore been requested to suggest that the Department of the Interior might reserve the area in question from homestead entry or other disposition for a year, or until the Lake of the Woods Reference before the International Joint Commission has been disposed of.

"The attached sketch shows the land along the margins of the Lake in the Province of Manitoba that might reasonably be expected to be affected.

"I have been requested to submit the situation for your consideration, and to respectfully suggest that the reservation suggested by the Board be put in force at the earliest possible date."

279 3. Letters from Agent of Dominion Lands at Winnipeg to J. B. Challies, dated September 21, 1915.

"I beg to acknowledge the receipt of yours of the 11th inst., reference 6815-W., enclosing a memorandum of lands in the vicinity of the Lake of the Woods, which you requested to be reserved from entry, for water power purposes, and in reply I beg to state I have made a check of the records and have reserved all the lands which are available. I am enclosing you a list of lands, showing the lands which have been disposed of in several Townships."

4. Memorandum from J. B. Challies to N. O. Cote, dated February 24, 1916.

"On September 11th last I submitted a schedule of lands in Manitoba bordering on the Lake of the Woods, requesting that you report on the standing of these lands and note File 6815-W against those sections still vacant. This was duly done.

"Some three weeks later, for a somewhat different purpose, your branch was asked to report on certain townships in the above mentioned locality and consequently such sections in these townships, which were included in the former schedule, should have had File 6815-W noted against them. I note, however, that in certain cases the land was reported as vacant. I am bringing this to your attention in order to be sure that the reservation is correctly noted. The following parcels reported as vacant on September 30th last should have File 6815-W. P. noted against them.

All 20-1-17 E. (Fractional).

L. S. 13-2-16 E. (and not L. S. 11.)

E. ½ Sec. 12-2-16E.

Frl. N. W. ¼ 17-2-17E."

5. Letter from F. S. Checkley to J. B. Challies, dated April 7, 1916.

"I beg to acknowledge the receipt of your letter of the 24th of February, your files 6815-W, and 2410-W, in regard to the reservation of certain School Lands bordering on the Lake of the Woods, and in reply to say that a temporary reservation has been made of the School Lands mentioned in that letter."

6. Dominion Order in Council reserving lands affected by recommendations of the International Joint Commission, dated March 27, 1922.

"Whereas in the report dated 12th June, 1917, of the International Joint Commission with respect to the levels of Lake of the Woods it is recommended among other things that flowage rights should be secured up to contour 1064 sea level datum on all lands bordering on Lake of the Woods; and that Canada should acquire and hold in perpetuity for this purpose the necessary lands on the Canadian side of the boundary;

280 "And whereas His Excellency the Governor in Council did by Order in Council of the 17th July, 1919, accept and approve of the recommendations of the International Joint Commission in the above matters, copy of which Order in Council was transmitted to the Government of the United States under cover of a despatch dated the 21st July, 1919;

"And whereas certain of the necessary lands on the Canadian side of the boundary are Dominion Lands or School Lands which it is, therefore, desirable to place under definite reservation;

"Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of the Interior, is pleased to order and it is hereby ordered as follows:

1. "All the lands affected as set out in Schedule "A" hereto which are Dominion Lands are hereby reserved, and any other lands in the said Schedule "A" which may later come under the control of the Crown in the right of the Dominion of Canada shall thereupon be reserved from any disposition inconsistent with the requirements in connection with the regulation of the Lake of the Woods as set forth in the above mentioned Order in Council.

2. "All the School Lands affected as set forth in Schedule "B" hereto, shall be similarly reserved as soon as other available Dominion Lands have been selected in lieu thereof as provided in Section 39, sub-section 2 of the Dominion Lands Act."

7. Ontario Public Lands Act. (ch. 35 R. S. O. 192).

Section 60. "In all sales, free grant locations, leases, licenses of occupation, mining claims and other dispositions of public lands, or mining lands or mining rights the Minister may reserve from sale any water power or privilege, and such area of land in connection therewith as he may deem necessary, for the erection of building and plant, and the development and utilization of the power, together with the right to

lay out and use such roads as may be necessary for passage to and from such water power or privilege and land, and may, with the approval of the Lieutenant-Governor in Council, fix the terms and conditions upon which such water power or privilege and land may be sold or leased and developed."

8. Letter from J. B. Challies to Hon. Beniah Bowman, dated November 24, 1920.

"At a meeting of Lake of the Woods Control Board on 4th November, it was resolved that your attention be re-
281 spectfully drawn to the recommendations of the International Joint Commission with reference to the reservation of flowage easements over riparian public lands around all larger lakes in the Lake of the Woods watershed.

"In this connection I would refer you to page 35 of International Joint Commission final report on Lake of the Woods Reference, wherein it is recommended,—'It further believes that, as far as possible, the two Governments, respectively, should reserve a flowage easement over all public raparian lands around the larger lakes on the watersheds in both countries to an elevation of at least 5 feet above extreme natural high water mark or to such other elevation as after investigation they may agree upon.'

"Other than the general recommendation, a specific recommendation is made that a flowage easement on the shores of Lake of the Woods be retained to elevation 1064 sea level datum, Rainy Lake to elevation 501, D. P. W. Datum and Namakan Lake to elevation 516 D. P. W. Datum.

"Pursuant to the above recommendations reservations have been made of the riparian lands in Manitoba around Lake of the Woods under the jurisdiction of the Dominion Government. Of the remaining riparian lands in Canada jurisdiction and control is vested in the Province of Ontario and it is the opinion of the Board that action should be taken by the Province to reserve the necessary flowage rights."

9. Letter from Hon. Beniah Bowman to J. B. Challies, dated November 30, 1920.

"I have before me your letter of the 24th inst. in which a request is made that a flowage easement over Crown Lands adjoining the larger lakes on the Rainy River and Lake of the Woods water-shed be reserved to five feet above high water mark on the larger lakes and a special reservation to sea level elevation 1064 adjoining Lake of the Woods and to

Dominion Public Works datum of 501 and 516 adjoining Rainy Lake and Namakan Lake respectively.

"I have requested the Engineering and Surveying Branch to look into this matter and am advised that in view of the benefit which will accrue to the water power development in the country, the recommendation of the International Joint Commission in this respect should be acted upon.

"I am giving instructions that in the disposal of all Crown Lands adjoining the above mentioned lakes a reservation of flooding rights should be made as suggested."

282 10. Letter from L. V. Rorke to J. T. Johnston, dated November 27, 1929.

"Referring to our conversation yesterday in reference to the action which has been taken in this Department regarding a reservation of flooding rights over Crown land along the shores of Lake of the Woods, Rainy Lake and Namakan Lake, referred to in the letter of the Honorable, the Minister of Lands and Forests, dated November 30th, 1920, I have to say that the instructions to make such reservation have been carried out in the disposal of Crown lands along the shores of these Lakes since that date."

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283 Government Exhibit No. 67.

Certified Exhibits to Accompany Division VIII-A of Canada's Representation.

284 List of Exhibits.

Division VIII-A.

Number.

Electricity and Fluid Exportation Act.

Regulations under the Electricity and Fluid Exportation Act.

Dominion Water Power Act.

Regulations under the Dominion Water Power Act.

Resolution of the House of Commons of Canada, dated June 15, 1925.

Manitoba Water Power Act.

Proclamation bringing into force the Manitoba Water Power Act.

Letter from Hon. Wm. Finlayson to Hon. Charles Stewart, dated Nov. 30, 1929.

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285 Division VIII-A.

The Export of Power Opposed by Canada.

Extracts from Pertinent Acts, &c.

1. The Electricity and Fluid Exportation Act. (C. 54, R. S. C. 1927.)

Section 5. "No person shall export any power or fluid without a license, or any power or fluid in excess of the quantity permitted by his license, or otherwise than as permitted by such license.

2. No person shall, without a license, construct or place in position any line of wire or other conductor for the exportation of power, or any pipe line or other like contrivance for the exportation of fluid."

2. Regulations established under the Authority of the Electricity and Fluid Exportation Act by Order in Council dated November 4, 1907.

2. "Before commencing to supply any electrical energy, gas or fluid for exportation, the contractor shall obtain from the Department a license in respect of such exportation, the application for which license shall contain full and exact information as to the quantities proposed to be exported from Canada."

3. "The contractor shall, on or before the 1st day of April of each year, make application for the license referred to in the previous paragraph and shall pay therefor the following fee, namely: * * *"

4. "Any license issued hereunder shall be revocable at will by the Governor in Council if the licensee refuses or neglects to comply with any of the conditions from time to time imposed by the Governor in Council with regard to the supply and distribution of electrical energy, gas or fluid in Canada, and moreover, whenever such electrical energy, gas or fluid is required for the use of purchasers in Canada, any such license shall be revocable upon such notice to the licensee as the Governor in Council deems reasonable in each case."

3. Dominion Water Power Regulations.

Section 71. "No hydro-electric energy developed under the authority of these regulations shall be exported from Canada without the consent of the Minister and subject to such conditions as the Governor in Council may impose."

4. Resolution of the House of Commons of Canada, dated June 15, 1925.

"That in the opinion of this House export of hydro electric power from Canada should be permitted only on yearly license, and that hereafter no license for export of power beyond that already granted should be issued except with the concurrence of the province or provinces in which it is proposed to develop such power and of any other province adjacent to such development and interested therein."

286 5. Manitoba Water Power Act.

"The Water Power Act, Chapter 46, Statutes of Manitoba, 1930.

Section 7 (3). "There shall be implied in every permit, license, lease or other concession granted by the Crown under this Act, or the regulations, for any interest in water power or land required or necessary for the creation, protection or development thereof in addition to such other provisions as are contained in the regulations or in the conditions under which the permit, license, lease or other concession was disposed of a provision binding the permittee, licensee, or lessee

(a) that no power generated in Manitoba from any Provincial water power shall be exported across the international boundary."

6. Letter from Ontario Minister of Lands and Forests to the Minister of the Interior, dated November 30, 1929.

"I have your letter of the 26th instant, and note what you say in reference to the question that has arisen before the District Court of the United States for the District of Minnesota in connection with the condemnation of certain lands on the shore of the Lake-of-the-Woods required for storage purposes.

It has been the fixed policy of the Ontario Government for some years not to permit the export of power from hydro electric developments under the control of the Province.

There are, of course, a very few cases in which power has been exported for a considerable number of years, and it has not been thought wise to interfere with these, but no new export has been allowed for a number of years, and the policy of the Province is very much against this.

The representatives of your Department are quite at liberty to use this letter, but if you would like this assurance in any other form I will be glad to see if we can meet your wishes."

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287 Government Exhibit No. 68.

Certified Exhibits to Accompany Division XII of Canada's Representation.

288 List of Exhibits.

Division XII.

Number

Boundary Water Treaty of 1909.

The International Boundary Waters Treaty Act.

Dispatches between Canadian and United States governments, April 24, 1919, to April 19, 1922.

Lake of the Woods Convention of 1925.

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289 Division XII.

International Commitments make independent action by Private Interests impossible.

Extracts from Pertinent Acts &c.

1. Boundary Waters Treaty signed January 11, 1909.

Preliminary Article. "For the purposes of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary."

Article III. "It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or here-

after provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada, within their respective jurisdictions and with the approval as hereinafter provided, of a joint commission, to be known as the International Joint Commission.

The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of break-waters, the improvement of harbours, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes."

Article VIII. "The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:

(1) Uses for domestic and sanitary purposes;

(2) Uses for navigation, including the service of canals for the purposes of navigation;

(3) Uses for power and for irrigation purposes."

290 Article IX. "The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports to their respective Governments.

In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government."

2. An Act relating to the Establishment and Expenses of the International Joint Commission under the Waterways Treaty of January the eleventh, 1909, (1-2 George V. C. 28).

Section 2. "The laws of Canada and of the several Provinces thereof are hereby amended and altered so as to permit, authorize, and sanction the performance of the obligations undertaken by His Majesty in and under the said treaty; and so as to sanction, confer, and impose the various rights, duties and disabilities intended by the said treaty to be conferred or imposed or to exist within Canada."

3. Identical letters of reference on behalf of the Governments of the United States and Canada, dated June 27, 1912.

"The questions so referred are as follows, namely:

291 (1) In order to secure the most advantageous use of the waters of the Lake of the Woods and of the waters flowing into and from the lake on each side of the boundary for domestic and sanitary purposes, for navigation and transportation purposes, for fishing purposes, and for power and irrigation purposes, and also in order to secure the most advantageous use of the shores and harbors of the lake and

of the waters flowing into and from the lake, is it practicable and desirable to maintain the surface of the lake during the different seasons of the year at a certain stated level, and if so at what level?

(2) If a certain stated level is recommended in answer to question No. 1, and if such level is higher than the normal or natural level of the lake, to what extent, if at all, would the lake, when maintained at such level, overflow the low lands upon its southern border, or elsewhere on its border, and what is the value of the lands which would be submerged?

(3) In what way or manner, including the construction and operation of dams or other works at the outlets and inlets of the lake, or in the waters which are directly or indirectly tributary to the lake, or otherwise, is it possible and advisable to regulate the volume, use, and outflow of the waters of the lake so as to maintain the level recommended in answer to question 1, and by what means or arrangement can the proper construction and operation of regulating works, or a system or method of regulation, be best secured and maintained in order to insure the adequate protection and development of all the interests involved on both sides of the boundary, with the least possible damage to all rights and interests, both public and private, which may be affected by maintaining the proposed level?"

4. International Correspondence between the Two Governments.

This correspondence will be found in full in a separate Exhibit.

5. Lake of the Woods Convention (1925).

Preamble. "His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada, and the United States of America,

Desiring to regulate the level of Lake of the Woods in order to secure to the inhabitants of Canada and the United States the most advantageous use of the waters thereof and of the waters flowing into and from the lake on each side of the boundary between the two countries; and

292 Accepting as a basis of agreement the recommendations made by the International Joint Commission in its final report of May 18, 1917, on the Reference concerning

Lake of the Woods submitted to it by the Governments of Canada and the United States of America,

Have resolved to conclude a Conventon for that purpose and have accordingly named as their plenipotentiaries:—"

Article 4. "The level of Lake of the Woods shall ordinarily be maintained between elevation 1056 and 1061.25 sea-level datum, and between these two elevations the regulations shall be such as to ensure the highest continuous uniform discharge of water from the lake.

During periods of excessive precipitation the total discharge of water from the lake shall, upon the level reaching elevation 1061 sea-level datum, be so regulated as to ensure that the extreme high level of the lake shall at no time exceed elevation 1062.5 sea-level datum.

The level of the lake shall at no time be reduced below elevation 1056 sea-level datum except during periods of low precipitation and then only upon the approval of the International Lake of the Woods Control Board and subject to such conditions and limitations as may be necessary to protect the use of the waters of the lake for domestic, sanitary, navigation and fishing purposes."

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293 Government Exhibit No. 69.

Certified Exhibits to Accompany Division XIII of Canada's Representation

294 List of Exhibits.

Division XIII.

Number.

Map showing number and location of Indian reserves bordering on Lake of the Woods in Canada.

Indian Act.

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295 Division XIII.

The flowage of Indian lands by Private Parties difficult.

Extracts From Pertinent Acts.

Indian lands may be acquired only by direct action of the Canadian Government.

The Indian Act, (Dominion) (Ch. 98 R. S. C. 1927).

Section 50. "Except as in this Part otherwise provided, no reserve or portion of a reserve shall be sold, alienated or leased until it has been released or surrendered to the Crown for the purposes of this Part; but the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled without such land being released or surrendered, and may, without surrender, dispose to the best advantage, in the interests of the Indians, of wild grass and dead or fallen timber."

Section 51. "Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General."

Section 54. "All Indian lands which are reserves or portions of reserves surrendered, or to be surrendered, to His Majesty, shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part."

26
showing
Chief Surveyor
Dept. of Indian Affairs
Deputy
of Indian Affairs.
Amherst Peninsula

297 General Government's Exhibit 97.

"Adolph F. Meyer

Member American Society of Civil Engineers
Member American Society of Mechanical Engineers
Consulting Hydraulic Engineer
628 Metropolitan Bank Building,
Minneapolis, Minnesota.

February 2nd, 1931.

Mr. I. K. Lewis,
Ryan Hotel,
Saint Paul, Minnesota.

Dear Mr. Lewis:

Mr. Harries has called my attention to one statement in the offer of proof which I evidently inadvertently overlooked. It refers to the impossibility of utilizing the storage possibilities of the Lake of the Woods reservoir without flooding the lands on the South shore in Minnesota.

The facts are that, inasmuch as the interests of navigation in both countries and summer resort interests in the Northern portion of the Lake of the Woods could not have been reasonably satisfied by utilizing a five and one-half foot storage range below elevation 1059, it would have been necessary to flood the lands on the South shore of the Lake in order to secure the same storage range above levels satisfactory to navigation and summer resort interests.

Yours very truly,

ADOLPH F. MEYER."

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298 Order Allowing Proposed Amendments of Bill of Exceptions.

In the District Court of the United States for the District of Minneota, Fifth Division.

Upon Removal From the Sixth Division, District of Minnesota (Law 539).

United States of America, Petitioner,
1549. vs. Law.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner, and of Harry Brewster, Respondent, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 247, 248, 252, as set forth in said award.

In the matter of the Appeal of United States of America, Petitioner, and of Randor G. Karlson, Respondent, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 86 and 87, as set forth in the said award.

In the matter of the Appeal of United States of America, Petitioner and of Elias A. Olson, Respondent, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 147, as set forth in the said award.

The United States, appellee herein, having proposed the following amendments of the Bill of Exceptions presented by the appellant, these amendments were considered by the Court in chambers at St. Paul, July 30, 1931. Each party appeared by counsel. And the Court being of the opinion that the proposed amendments are necessary to present clearly the questions of law involved in the rulings to which exceptions are preserved.

It Is Ordered, that the Bill of Exceptions presented by the appellant be and it hereby is amended as follows:

1. By adding to such Bill of Exceptions the annexed
299 portions of the stenographer's minutes of proceedings upon the trial of said cause, condensed in narrative form, save as a proper understanding of the questions presented may require that parts be set forth in the manner and form of the attached transcript, which the Court hereby approves and directs the Clerk to employ.

2. By adding to said Bill of Exceptions the following original Exhibits, received in evidence and on file in the office of the Clerk of this Court at Duluth, Minnesota; said original exhibits to be embodied in said Bill of Exceptions by reference, with the same effect as though reproduced therein:

1—Government exhibit numbered 4—The watershed map of the Lake of the Woods accompanying report of engineers to the International Joint Commission relating to the investi-

gation of the levels of the Lake of the Woods and tributary waters.

2—Government exhibit numbered 3—Map of lands in affected easement zone prepared by the Corps of Engineers of the United States Army under date of March 1, 1927.

3—Government exhibit numbered 2—Map of Lake of the Woods and surrounding territory indicating governmental subdivisions.

4—Government exhibit numbered 9—House of Representatives Executive Document numbered 247, 51st Congress, First Session (1 Volume).

5—Government exhibit numbered 10—Certificate of William Tyler Page, clerk of the House of Representatives, that government exhibit numbered 9 (H. R. Executive Document 247) is correct excepting as noted in memorandum attached to certificate.

6—Government exhibit numbered 11—True copy of original maps and text of the 18th Annual Report of the Bureau of American Ethnology, certified by Acting Commissioner of Indian Affairs, January 17, 1931.

7—Government exhibits numbered 13 to 17 inclusive—Certified copies of applications for homestead entry made by the appellants or their predecessors in title.

8—Government exhibit numbered 21—True copies of original maps as the same appear in the Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the fiscal years ending June 30, 1888, 1889 and 1890, certified by Acting Commissioner of Indian Affairs.

9—Government exhibit numbered 22—Photostatic copies of Rand McNally & Company's maps registered for copyright February 7 and February 17, 1888, certified by Acting Assistant Registrar of Copyrights, January 21, 1931.

10—Government exhibit numbered 23—Photostatic copies of Rand McNally & Company's maps registered for copyright July 23, 1888 and August 13, 1888, certified by Acting Assistant Registrar of Copyrights.

11—Government exhibit numbered 24—Atlas to accompany report of consulting engineers to the International Joint Commission relating to official reference re Lake of the Woods levels.

12—Government exhibit numbered 26, Copy of executive order withdrawing certain lands from homestead entry dated April 28, 1928, certified by Henry L. Stimson, Secretary of State, by his Chief Clerk.

13—Government exhibit numbered 27—Copy of executive order withdrawing certain lands from homestead entry, dated January 14, 1929, certified by Henry L. Stimson, Secretary of State, by his Chief Clerk.

300

14—Government exhibits numbered 28 to 54, inclusive,—excepting however government exhibits numbered 33, 40 and 50, of which copies are being transmitted, the said exhibits being certified copies of deeds of land in the area affected by these proceedings.

15—Government exhibits numbered 60 to 69, inclusive, the same being respectively designated as the following: Representations of Canada, Divisions I, II, V, VI, VII, Supplement to Division VII, VIII, VIIIA, XII and XIII.

16—Government exhibit numbered 71—Final Report of the International Joint Commission on the Lake of the Woods Reference.

17—Government exhibit numbered 94—Township map of a portion of Roseau County.

18—Government exhibit numbered 95—Township map of a portion of Lake of the Woods County.

19—Government exhibit numbered 96—Report of the Bureau of Census for 1930, showing the population of Townships of Lake of the Woods County bordering on the Lake of the Woods at pages 17 and 18; and the population of Townships in Roseau County bordering on the Lake of the Woods at page 25.

20—Government exhibit numbered 110—Certified copy of deed conveying flowage rights to the United States, dated April 5, 1928, Lewes Anensen and Regina Anensen, grantors.

21—Government exhibit numbered 113—Certified copy of deed conveying flowage rights to the United States dated August 27, 1928, Ole O. Lillevig and Bertine Lillevig, grantors.

22—Government exhibit numbered 114—Certified copy of deed conveying flowage rights to the United States dated May 28, 1928, Lars Engstrom and Karin Engstrom, grantors.

3. By adding to said Bill of Exceptions copies of the following exhibits, received in evidence and on file in the office of the Clerk of this Court at Duluth, Minnesota:

1—Government exhibit numbered 3—Map of lands in affected easement zone showing classes of ownership prepared by the Corps of Engineers of the United States Army, dated March 1, 1927.

1a—Government exhibit numbered 11—Map No. 35 (PL. CXL 11) of 18th Annual Report, Bureau American Ethnology showing Indian Land Cessions in the United States; ceded portion shown in blue tint; and accompanying text.

2—Government exhibit numbered 12—Homestead Entry application of Elias A. Olson and other papers certified by Acting Assistant Commissioner, General Land Office, as filed under Cass Lake number 013,608.

3—Government exhibit numbered 18—Certificate of the Register of the United States Land Office at Cass Lake, Minnesota, dated January 15, 1931.

4—Government exhibit numbered 19—The following portions of certificate of the Register of the United States Land Office at Cass Lake, Minnesota, dated January 7, 1931: Paragraph numbered 3 of said certificate.

301 5—Government exhibit numbered 25—Table to accompany report to Chief of Engineers, January 2, 1931.

6—Government exhibit numbered 29—Deed from Lloyd Henry Harrison to Harry Brewster dated February 14, 1923.

7—Government exhibit numbered 33—Deed from Richard C. Edwards and Edith V. Edwards, to John R. Morris and William F. Steffes, dated August 18, 1915.

8—Government exhibit numbered 40—Deed from Andrew Johnson as administrator, to Andreas Strandenas, dated June 6, 1925.

9—Government exhibit numbered 50—Deed from Alfred F. Green, single, to Randor G. Karlson, dated August 10, 1921.

10—Government exhibit numbered 60 (cover page and entire contents of exhibit).

11—The following portions of government exhibit numbered 61:

a. Cover page.

b. List of exhibits division II.

c. Extract from pertinent Acts, received and filed as part of government exhibit 61.

12—The following portions of government exhibit numbered 62:

a. Cover page.

b. List of exhibits, division V:

c. Extracts from pertinent Acts, received and filed as part of government exhibit numbered 62.

13—The following portions of government exhibit numbered 63:

a. Cover page.

b. List of exhibits, division VI.

c. Extracts from pertinent Acts received and filed as part of government exhibit numbered 63.

14—The following portions of government exhibit numbered 64:

a. Cover page.

b. List of exhibits, division VII.

c. Extracts from pertinent agreements and Acts &c, received and filed as part of government exhibit numbered 64.

15—The following portions of government exhibit numbered 65:

a. Cover page.

b. List of exhibits (supplement to division VII).

c. Typewritten sheets designated, supplement to division VII, received and filed as part of government exhibit numbered 65.

16—The following portions of government exhibit numbered 66:

a. Cover page.

b. List of exhibits, division VIII.

c. Extracts from pertinent acts, received and filed as part of government exhibit numbered 66.

17—The following portions of government exhibit numbered 67:

a. Cover page.

b. List of exhibits, division VIIIA.

c. Extracts from pertinent Acts &c, received and filed as part of government exhibit numbered 67.

18—Government exhibit numbered 68, omitting the convention and protocol between His Britannic Majesty in respect of the Dominion of Canada and the United States, signed at Washington the 24th day of February, 1925, and omitting all other parts of said exhibit (the originals having been transmitted) except (a) cover page (b) list of exhibits (c) extract from pertinent acts.

382 19—The following portions of government exhibit 69:

a. Cover page.

b. List of exhibits, division XIII.

c. Extracts from pertinent acts, received and filed as part of government exhibit numbered 69.

d. Map showing Indian Lands in Canada bordering on Lake of the Woods.

20—Government exhibit numbered 97—Letter written by Adolph F. Meyer under date of February 2, 1931.

4. By adding the following statement of the Court to said Bill of Exceptions at the point where it recites (on page 92, line 1-4 of the typewritten proposed Bill of Exceptions) that the testimony of William Rulien was ordered stricken by the Court:—

R. T.
243

"If there is any other evidence that you think the Court should have, outside of the testimony which this witness which you are putting on now, will testify to,—I presume these witnesses are going to testify to their having made purchases of land below 1064 with the idea that they had a greater value than other lands up there on account of their use for reservoir purposes—of course I could receive that."

5. By adding to said Bill of Exceptions the original of the written objections presented by counsel for the Dominion of Canada in opposition to the admission of evidence of the value of respondents' lands for reservoir purposes; such

written objections to be transmitted to the Clerk of the Circuit Court at St. Louis and incorporated in this Bill of Exceptions by reference as fully as if reproduced herein.

6. By striking from the Bill of Exceptions proposed by appellant the word in parenthesis and inserting the words underlined in the following portion of said proposed Bill at line 30 on page 2 of the typewritten transcript thereof:

".....the appeals involved herein arise out of condemnation proceedings brought by the United States to (condemn) acquire by such condemnation proceedings a flowage easement up to contour 1064....."

7. By adding after the last sentence of the testimony of the witness Meyer on page 5, lines 4-5 of the typewritten transcript of appellant's proposed Bill of Exceptions

303 By Mr. Harries:

Q. Mr. Meyer, in speaking of the use to which the lands are to be put, and making a comparison of the values of such uses, do you have in mind the market value, or the value of the use, or what I might call the utility value, or the economic value, or could you explain that to us?

A. I have in mind the use-value of the land.

8. By adding at the end of line 32 on page 5 of the typewritten transcript of appellant's proposed Bill of Exceptions the words underlined in the following sentence:

Mr. Meyer testified also that so far as he knows no flowage easements have been bought or sold on the Lake of the Woods as flowage easements.

9. By striking from said bill of exceptions, as proposed by appellant, the second paragraph comprised in lines 7 to 11, inclusive, of page 6 of the typewritten transcript of such proposed Bill of Exceptions and in lieu thereof reciting that the following proceedings took place:

Bernhard A. Arnesen was called as a witness on behalf of the respondents. Immediately after this witness was sworn the government counsel asked leave of court to state the government's objection to the testimony previously sought to be adduced by respondent and which the government anticipated would be supported by cumulative testimony of this witness relating to reservoir values of lands on the shores of the Lake of the Woods. The court granted government counsel permission to state the government's ob-

jections to such testimony and they were set before the court by the following proceedings:

By Mr. Harries:

The Government of the United States objects to the admission of any evidence concerning any of the following:

1. The availability of respondents' lands as part of the reservoir contemplated under the treaty between the United States and Canada.

2. The uses and benefits of storage of water in the Lake of the Woods.

3. Water power sites on the Winnipeg River or elsewhere.

4. Values of respondents' lands based upon their use in whole or in part as a part of such storage basin.

5. The anticipation of buyers of shore lands that reservoir uses ever had enhanced or ever would enhance the value of their lands.

In connection with the foregoing objection government counsel stated 35 grounds for such objections. These
304 grounds of objection are set forth, herein at page ....., line to page ....., line ....., (page 10, line 1, page 16, line 28 of typewritten transcript of Bill of Exceptions proposed by appellant), in connection with the Government's objections to written offers on the part of respondents to prove certain facts by means of the testimony of Adolph F. Meyer.

10. By striking from lines 24 and 25 on page 6 of the typewritten transcript of appellant's proposed Bill of Exceptions the words in parenthesis in the following sentence:

That there has been no market in the usual and accepted sense of that term for flowage easements (on the shores of the Lake of the Woods) .....

11. By adding to the proposed Bill of Exceptions at line 5 on page 92 of the typewritten transcript thereof, the testimony of William Rulien as set forth verbatim at pages 33-34 inclusive, herein.

12. By inserting at line 18, page 93 of such proposed Bill of the following passage:

"Mr. Harries: The Government has no objection to testimony on the part of this witness as to the price he paid for

the lands involved in this proceeding, but object to any testimony as to the motive he may have had in acquiring the same, on the ground that it is incompetent, irrelevant and immaterial."

and inserting at line 15 of page 96 of such proposed Bill the testimony of Elias Olson as shown on page 35, hereof, and by inserting at line 25, page 100 of appellant's proposed Bill of Exceptions the testimony of Randor G. Karlson, as set forth on pages 36 and 37 herein.

13. By adding to line 32 of page 7 of the typewritten
305 transcript of such proposed bill the word which is underlined in the following sentence:

"..... It was the court's opinion that the question could best be presented on appeal by his excluding all evidence which in any way tended to prove that respondents' lands had any additional value solely because of the fact that they formed a part of the Lake of the Woods storage reservoir."

14. By adding to line 2 page 8 of the typewritten transcript of the Bill of Exceptions proposed by appellant the following:-

Counsel for the respondents made the following additional statement immediately succeeding the statement last above described:

By Mr. Lewis:

Well, these are not to be regarded as offers of proof.

The Court: No, it is assumption of fact as the basis of your argument.

15. By changing the word four as it appears on line 7,
page 14 of the Bill of Exceptions proposed by appel-
306 lant to the word forty so that paragraph numbered 11 on said page shall be amended by omitting the word in parenthesis and substituting the words and letter underlined in the following passage:

"11. The Indian Act of the Dominion of Canada requiring a majority of consent from each band located on Indian reservation adjacent to said lake of which there are (four) forty renders it wholly impracticable and infeasible to contemplate successful negotiations with said Indian occupants leading to their consent to relinquishment of their reservations.

16. By adding to the Bill of Exceptions proposed by appellant at the end of the sentence completed at line 19 page 92 of the typewritten transcript of such proposed Bill, the following language:

Government counsel stated that there was no objection to testimony on the part of the witness as to the price he paid for the lands involved in this proceeding.

17. By adding to line 28 page 123 of the typewritten transcript of the Bill of Exceptions proposed by appellant the following:

The Government's objection was stated in the following terms (By Mr. Harries) We object to the exhibit and its reception in evidence on the ground that it is hearsay, incompetent, irrelevant and immaterial and no proper foundation has been laid for its introduction; and to the offer with reference to the knowledge of the people in Roseau and Lake of the Woods Counties, of the contents of this editorial, we object on the ground that that is immaterial.

18. By adding to the Bill of Exceptions proposed by appellants the whole of respondents' Exhibits 32 and 33, being, respectively, the government report of the final arguments at Washington, April 4 to 8, 1916, before the International Joint Commission on the Lake of the Woods reference (Exh. 32) and brief of Keewatin Power Company, Ltd., by C. J. Rockwood (Exh. 33) as original exhibits to be transmitted to the Clerk of the Circuit Court of Appeals for the Eighth Circuit and embodied in the Bill of Exceptions by reference and not to be copied therein.

19. By striking from line 13, page 114 of the typewritten transcript of the Bill of Exceptions proposed by appellant the words shown in parenthesis, and in lieu thereof inserting the words underlined in the following passage:

307 By Hon. C. J. Rockwood (member of) attorney appearing before the International Joint Commission.

By the Court,

JOHN B. SANBORN,
United States Judge.

Dated at St. Paul, Minnesota, July 30, 1931.

308 Amendments
of
Bill of Exceptions,
Referred to in Paragraph Number 1
of the Foregoing Order.

The foregoing amendments as contained in the Order of Court, Sanborn, J., dated July 30, 1931, are set forth at the end of the bill of exceptions as amended at [marginal] pages 175-206 and are not repeated here.

309 Testimony to be inserted in Bill of Exceptions as proposed by appellant, (in addition to the foregoing testimony to be added to appellant's proposed Bill of Exceptions).

The testimony has been duly inserted in the Bill of Exceptions, as amended, and is not repeated here.

Endorsed: Filed August 3, 1931. Joel M. Dickey, Clerk. By E. Catherine Neff, Deputy.

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310 Motion and Order for Transmission of Original Exhibits to the Circuit Court of Appeals.

The United States of America, appellee, respectfully moves the Court, ex parte, for an order directing the Clerk of this court to transmit the following original exhibits to the Circuit Court of Appeals for the Eighth Circuit at Saint Louis, Missouri, in connection with the appeals herein, to said
311 court, upon the ground that such exhibits are of large proportions and that it is impracticable to duplicate all of them and include them in a transcript of the record.

1—Government exhibit numbered 4—The watershed map of the Lake of the Woods accompanying the report of engineers to the International Joint Commission relating to the investigation of the levels of the Lake of the Woods and tributary waters. Exhibit #4 in Law 539.

2—Government exhibit numbered 3—Map of lands in affected easement zone prepared by the Corps of Engineers of the United States Army under date of March 1, 1927.

3—Government exhibit numbered 2—Map of Lake of the Woods and surrounding territory indicating governmental subdivisions. (Exhibit #2 in Law 539.)

4—Government exhibit numbered 9—House of Representatives Executive Document numbered 247, 51st Congress, First Session (1 Volume).

5—Government exhibit numbered 10—Certificate of William Tyler Page, clerk of the House of Representatives, that government exhibit numbered 9 (H. R. Executive Document 247) is correct excepting as noted in memorandum attached to certificate.

6—Government exhibit numbered 11—True copy of original maps and text of the 18th Annual Report of the Bureau of American Ethnology, certified by Acting Commissioner of Indian Affairs, January 17, 1931.

7—Government exhibits numbered 13 to 17 inclusive—Certified copies of applications for homestead entry made by appellants or their predecessors in title.

8—Government exhibit numbered 21—True copy of original maps as the same appear in the Annual Report of the Commissioner of Indian Affiairs to the Secretary of the Interior for the fiscal year ending June 30, 1888, 1889 and 1890, certified by Acting Commissioner of Indian Affairs.

9—Government exhibit numbered 22—Photostatic copy of Rand McNally & Company's maps registered for copyright February 7 and February 17, 1888, certified by Acting Assistant Register of Copyrights, January 21, 1931.

10—Government exhibit numbered 23—Photostatic copy of Rand McNally & Company's maps registered for copyright July 23, 1888, and August 13, 1888, certified by Acting Assistant Register of Copyrights.

11—Government exhibit numbered 24—Atlas to accompany report of consulting engineers to the International Joint Commission relating to official reference re Lake of the Woods levels.

12—Government exhibit numbered 26—Copy of executive order withdrawing certain lands from homestead entry dated April 28, 1928, certified by Henry L. Stimson, Secretary of State by his Chief Clerk.

13—Government exhibit numbered 27—Copy of executive order withdrawing certain lands from homestead entry, dated January 14, 1929, certified by Henry L. Stimson, Secretary of State by his Chief Clerk.

312 14—Government exhibits numbered 28 to 54 inclusive, excepting however government exhibits numbered 33, 40 and 50, of which copies are being transmitted, the said exhibits being certified copies of deeds of land in the area affected by these proceedings.

15—Government exhibits numbered 60 to 71 inclusive, omitting therefrom government exhibit numbered 70, the same being respectively designated as the following: Representations of Canada, Divisions I, II, V, VI, VII Supplement to Division VII, VIIIA, XII and XIII.

16—Government exhibit numbered 71—Final Report of the International Joint Commission on the Lake of the Woods Reference.

17—Government exhibit numbered 94—Township map of a portion of Roseau County.

18—Government exhibit numbered 95—Township map of a portion of Lake of the Woods County.

19—Government exhibit numbered 96—Report of the Bureau of Census for 1930, showing the population of Townships of Lake of the Woods County bordering on Lake of the Woods at pages 17 and 18; and the population of Townships in Roseau County bordering on Lake of the Woods at page 25.

20—Government exhibit numbered 110—Certified copy of deed conveying flowage rights to the United States, dated April 5, 1928, Lewes Anensen and Regine Anensen, grantors.

21—Government exhibit numbered 113—Certified copy of deed conveying flowage rights to the United States dated August 27, 1928, Ole O. Lillevig and Bertine Lillevig, grantors.

22—Government exhibit numbered 114—Certified copy of deed conveying flowage rights to the United States dated May 28, 1928, Lars Engstrom and Karin Engstrom, grantors.

LEWIS L. DRILL,
United States Attorney,
Saint Paul, Minnesota.
By Donald D. Harries,
Special Assistant U. S Attorney,
1200 Alworth Building, Duluth, Minn.

Order.

Upon the foregoing motion made to the Court in Chambers ex parte

It Is Ordered that the original exhibits designated in the foregoing and hereto attached motion shall be transmitted to the United States Circuit Court of Appeals
313 for the Eighth Circuit at Saint Louis, Missouri, in connection with the appeal herein.

Dated at St. Paul, Minnesota, this 15th day of July, 1931.

By the Court:

JOHN B. SANBORN, Judge.

Endorsed: Filed August 3, 1931. Joel M. Dickey, Clerk. By E. Catherine Neff, Deputy.

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314 (Praecipe for Transcript on Behalf of United States of America.

To:

Joel M. Dickey, Clerk of the United States District Court, Saint Paul, Minnesota.

E. Catherine Neff, Deputy Clerk of the United States District Court, Fifth Division, Duluth, Minnesota.

C. E. Berkman, Esq., Sartori Building, Chisholm, Minnesota.

I. K. Lewis, Esq., and Lewis, Hunt & Palmer, 500 First National Bank Building, Duluth, Minnesota.

John H. Hougen, Polk County, State Bank Building, Crookston, Minnesota.

315 Sirs:

Please Take Notice that the United States of America, appellee herein, having been served on July 1, 1931, with a copy of appellant's amended praecipe for transcript, hereby designates, pursuant to Rule No. 14 (2) of the Rules of the United States Circuit Court of Appeals for the Eighth Circuit, the following additional parts of the record deemed necessary by the appellee to a proper consideration of the appeals herein.

1. Order of Court, dated December 6, 1930, allowing amendment of petition in Law 539 (Fifth Division Law Number 1549).

2. The following paragraphs of the petition in Law 539 as amended by the order described in paragraph numbered 1 (next above):

Paragraphs I, II, III, IV, V, X, XI, XII, and the prayer of said amended petition.

3. Amendments of Bill of Exceptions, as allowed by order of Court dated July 30, 1931 and duly filed with the Clerk of

the United States District Court for the District of Minnesota, Fifth Division, at the City of Duluth.

4. Order of Court dated July 30, 1931, allowing appellee's proposed amendments of Bill of Exceptions presented by appellants.

5. Order of Court dated July 15, 1931, directing the transmission of the original Exhibits therein described to the Circuit Court of Appeals for the Eighth Circuit.

6. This praecipe.

The Clerk will please prepare and transmit to the Circuit Court of Appeals for the Eighth Circuit in connection with the appeals herein a transcript and true copy of the foregoing portions of the record and proceedings in the foregoing causes which are hereby designated by the United
316 States of America, appellee, as the additional portions of the record deemed necessary by it to a consideration and determination of the errors assigned by the appellant herein.

LEWIS L. DRILL,
United States Attorney,
St. Paul, Minnesota.
By Donald D. Harries,
Special Assistant United States Attorney,
1200 Alworth Building,
Duluth, Minnesota.

Endorsed: Due and personal service of the within Praecipe, by copy, is hereby admitted at Duluth, Minnesota, this 1st day of August, 1931.

LEWIS, HUNT & PALMER.

Filed August 1, 1931. Joel M. Dickey, Clerk. By E. Catherine Neff, Deputy.

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317 VII.

(Petition for Appeal on Behalf of Elias A. Olson.)

To The Honorable, The District Court of the United States for the District of Minnesota:

Now comes Elias A. Olson, one of the respondents above named, and plaintiff in error herein, by I. K. Lewis, of the firm of Lewis, Hunt & Palmer, his attorneys, and feeling himself aggrieved by the final judgment and decree of this court en-

tered in his favor and against the United States of America, the petitioner above named, on the 13th day of February, 1931, hereby prays, that an appeal may be allowed to him from the said decree to the Circuit Court of Appeals of the United States of America for the Eighth Circuit, and in connection with this petition said petitioner herewith presents his assignment of errors.

Petitioner further prays that an order for a cost bond may be entered herein pending the final disposition of the cause, and that the amount of security may be fixed by an order allowing this appeal.

I. K. LEWIS, of Lewis, Hunt & Palmer,
One of the attorneys for Elias A. Olson,
Plaintiff in error, 500 First Nat'l Bank
Bldg., Duluth, Minnesota.

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318 IX.

Order Allowing Appeal.

On reading the petition of Elias A. Olson, for an appeal from the order and judgment of this court duly entered in said proceedings on February 13, 1931, and the assignment of errors presented and filed in connection with said petition, and upon due consideration of the record of said cause;

It Is Ordered, That an appeal be allowed to the Circuit Court of Appeals of the United States for the Eighth Circuit as prayed for in said petition, and that said appeal and all further proceedings thereon be allowed in accordance with law, on condition that within thirty days from the date hereof, appellant file a bond for costs in the sum of $500.00, with a surety or sureties to be approved by the court, that said appellant shall prosecute said appeal to effect, and if said appellant fails to make his plea good, shall answer to said petitioner, defendant in error, for all costs and damages that may be adjudged or decreed on account of said appeal.

Dated at Duluth, Minn. this 5th day of May, 1931.

By the Court:

JOHN B. SANBORN,
Judge, U. S. District Court,
District of Minnesota.

Endorsed: Filed May 11, 1931. Joel M. Dickey, Clerk. By J. L. Ketten, Deputy.

319 (Memorandum of Clerk of District Court as to Amended Assignment of Errors.)

The original amended assignment of errors having been filed with the Clerk of the United States Circuit Court of Appeals, and being a part of the records of that Court, it is omitted from this transcript.

(Amended Assignment of Errors Hereafter Appears in this Printed Record.)

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320 X.

Bond on Appeal.

Know All Men By These Presents, that we, Elias A. Olson, as principal, and Southern Surety Company of New York, a corporation organized under the laws of the State of New York, and holding the certificate of the Insurance Commissioner of the State of Minnesota, showing that it is authorized to contract as surety upon bonds in said State of Minnesota, as surety, are held and firmly bound unto the United States of America, in the full and just sum of $500.00 to be paid to the said United States of America, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 25th day of April, 1931.

And Whereas, lately at a term of the District Court of the United States, for the District of Minnesota, Sixth Division, in a suit pending in said court between United States of America, Petitioner, and Elias A. Olson, respondent, a judgment and final order was rendered in said action, and

Whereas, said respondent is aggrieved by said judgment and final order, and desires to appeal therefrom to the Circuit Court of Appeals for the 8th Circuit of the United States of America, and the said respondent, Elias A. Olson, the principal above named, having obtained an appeal to the Circuit Court of Appeals of the United States for the 8th Circuit, to reverse the judgment and final order in the aforesaid action and suit, Now, the condition of the above

321 obligation is such that if the said Elias A. Olson shall prosecute his appeal to effect, and answer all damages and costs if he fails to make his plea and appeal good, then the above obligation to be void; otherwise to remain in full force and effect.

Sealed and delivered on the day and year hereinabove written.

Signed, sealed and delivered
in the presence of:

P. S. Smith
D. M. White
As to principal

ELIAS A. OLSON (Seal)

L. McFarlane
B. M. Andrew

SOUTHERN SURETY COMPANY
OF NEW YORK,
By C. F. Liscomb,
Its Attorney-in-fact (Seal)

322 State of Minnesota,
County of Lake of the Woods—ss.

On this 11th day of May, 1931, before me personally appeared Elias A. Olson, to me known to be the respondent and principal named in the foregoing bond, and he acknowledged that he executed the same for the uses and purposes therein expressed as his free and wilful act and deed.

P. S. SMITH,
(Notarial Seal) Notary Public, Lake of the Woods County, Minnesota.

My comm. expires Nov. 18, 1937.

State of Minnesota,
County of St. Louis,
City of Duluth—ss.

On this 16th day of May, 1931, before me personally appeared C. F. Liscomb, Attorney-in-fact of the Southern Surety Company of New York, with whom I am personally acquainted, who, being by me duly sworn, did depose and say, that he resides in Duluth, Minn.; that he is the Attorney-in-fact of the Southern Surety Company of New York, the corporation named in and which executed the within instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed and executed the said instrument as Attorney-in-fact of said corporation by like order.

LAURA McFARLANE,
(Notarial Seal) Notary Public, St. Louis Co., Minn.

My comm. expires Oct. 2, 1932.

Approval of Bond.

The within bond is hereby approved this 21st day of May, 1931.

By the Court:

JOHN B. SANBORN,
U. S. District Judge.

Endorsed: Filed August 1, 1931. Joel M. Dickey, Clerk, By E. Catherine Neff, Deputy.

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323 Citation.

United States District Court, District of Minnesota, Sixth Division.

United States of America, Petitioner and defendant in error,

No. 1549 vs. 8th Div.

Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the appeal of United States of America, petitioner, and of Elias A. Olson, respondent and plaintiff in error, from the award of the commissioners heretofore appointed herein in connection with the tract and easement numbered 147 as set forth in the said award.

The United States of America to United States of America, petitioner and defendant in error above named—Greetings:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, forty days from and after the day this citation bears date pursuant to an appeal allowed and filed in the Clerk's office of the United States Court for the District of Minnesota, Sixth Division, wherein the above named Elias A. Olson is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against said United States of America, as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Hon. John B. Sanborn, Judge of the United States District Court for the District of Minnesota, this 5 day of May, 1931.

JOHN B. SANBORN,
Judge of the United States District Court for the District of Minnesota.

Personal service of the within Citation is hereby admitted this 19 day of May, 1931.

DONALD D. HARRIES,
One of Attorneys for Petitioner.

Endorsed:- Filed in U. S. District Court on May 22, 1931.

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325 (Order for Consolidation of Three Appeals.)

United States Circuit Court of Appeals, Eighth Circuit.

May Term, 1931.

Tuesday, June 30, 1931.

United States of America, Petitioner,

vs.

Various Tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent and of Harry Brewster, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 248, as set forth in the said award.

and

United States of America, Petitioner,

vs.

Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, petitioner-respondent, and of Randor G. Karlson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection

with the tract and easement numbered 86 and 87, as set forth in the said award.

and

United States of America, Petitioner,

vs.

Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent, and Elias A. Olson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 147, as set forth in the said award.

On Appeal from United States District Court, District of Minnesota, Sixth Division. Transferred to Fifth Division.

The three appellants above named having moved the Court for an order consolidating said appeals, and for other relief, the Court being fully advised in the premises,

326 It Is Ordered: That the three appeals above entitled be and hereby are consolidated for all purposes.

It Is Further Ordered That a Consolidated Record for purposes of said appeals may be prepared and filed; that such Consolidated Records shall be sufficient for all purposes in each of said three appeals if it shall contain one original transcript of each of the following:

Petition and Order allowing Appeal, Bond, Amended Assignment of Errors, Citation, Stipulation or Praecipe for Transcript of Record, with proof of service thereof, Appellee's designation of any additional parts of the Record, the Judgment appealed from in each case, and any other stipulations, orders or other documents considered necessary to a proper hearing of said appeals by either party, including Briefs of Counsel, That said Consolidated Record be entitled and filed in the appeal of appellant Elias A. Olson, and be considered and used as having been prepared and filed in each of said appeals; and that each of said appeals be heard and determined in all respects, and with the same force and effect as though the customary and requisite papers, record and proceedings on appeal were filed and had in each of said appeals.

Dated at St. Paul, Minn. this 30 day of June, 1931.

327 United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing pages contain a full, true and complete copy of the Order for Consolidation of the three Appeals of Harry Brewster, Randor G. Karlson and Elias A. Olson in the case of United States of America vs. Various tracts of Land, etc., as full, true and complete as the original of the same remains on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 7th day of July, A. D. 1931.

E. E. KOCH,
(Seal) Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed: Filed July 9th, 1931. Joel M. Dickey, Clerk. By E. Catherine Neff, Deputy.

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328 XIII.

Order of the Court Extending the Time within Which to File Designation of the Portions of the Record on Appeal.

On reading and filing the foregoing and hereunto attached stipulation,

It Is Hereby Ordered

1—That the time within which appellants may file in the court below a designation of the portions of the record deemed necessary by them to be included in a transcript thereof pursuant to Rule 14 of the Circuit Court of Appeals is hereby extended to and including July first 1931.

2—That the time within which appellee may file in the court below a designation of such additional parts of the record as it may deem necessary is hereby extended to and including August first 1931.

3—That the time within which the parties may file in the court below a stipulation designating the portions of the record to be included in the transcript to be sent to the Circuit

Court of Appeals, is hereby extended to and including August first 1931.

Dated at St. Paul, Minnesota, this 10th day of June, 1931.

By the Court:

JOHN B. SANBORN,
Judge, U. S. District Court.

Endorsed: Filed June 11, 1931. Joel M. Dickey, Clerk. By E. Catherine Neff, Deputy.

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329 (Order for Transmission to U. S. Circuit Court of Appeals of Printed Volume entitled "Arguments on the Reference by the United States and Canada in re Levels of the Lake of the Woods", etc.)

In the District Court of the United States for the District of Minnesota, Sixth Division.

Transferred to 5th Division.

United States of America, Petitioner,
539. vs. Law.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

On cause being shown:

It Is Hereby Ordered: That the Clerk of this Court transmit to the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, the printed volume entitled "Arguments on the reference by the United States and Canada in re Levels of the Lake of the Woods and its tributary waters and their future regulation and control" heretofore filed as an exhibit in connection with the ten test cases in the above entitled matter, for use on the appeal of Elias A. Olson to said United States Circuit Court of Appeals.

Dated at Duluth, Minn. this 3rd day of August, 1931.

By the Court:

WM. A. CANT,
U. S. District Judge.

Endorsed: Filed August 3, 1931. Joel M. Dickey, Clerk. By E. Catherine Neff, Deputy.

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330 (Election as to Printing of Record.)

To The Clerk of the Above Named Court:

Notice is hereby given that the above named respondent-appellant, hereby elects to take and file in the U. S. Circuit Court of Appeals for the 8th Circuit, in connection with the appeal heretofore allowed in the above entitled matter, to be printed under the supervision of the Clerk of said Appellate Court, and under its rules, a transcript of the parts of the record requested for hearing of the case in that court. This notice of election is filed pursuant to paragraph 10 of rule 26 of the U. S. District Court for Minnesota.

LEWIS, HUNT & PALMER,
Attorneys for appellants,
500 First Nat'l Bank Bldg.,
Duluth, Minnesota.

Endorsed: Filed August 1, 1931. Joel M. Dickey, Clerk. By E. Catherine Neff, Deputy.

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331 (Order Extending Time to File Transcript.)

For good cause shown, I the Judge of said Court who signed the citation upon the allowance of an appeal herein, do hereby enlarge the time within which said action may be docketed and the record thereof filed in the United States Circuit Court of Appeals for the Eighth Circuit, so that said cause may be docketed and the record so filed on or before the 1st day of September, A. D. 1931.

Dated June 13, 1931.

JOHN B. SANBORN,
Judge.

Endorsed: Filed June 13, 1931, Joel M. Dickey, Clerk. By Margaret L. Mullane, Chief Deputy.

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332 (Amended Praecipe for Transcript by Elias A. Olson, et al.)

To The Clerk of the Above Named Court:

Please prepare and transmit to the United States Circuit Court of Appeals for the Eighth Circuit, in connection with the appeal heretofore allowed in the above entitled proceed-

ing, a transcript and true copy of the following portions of the record and proceeding in said cause:

1. Paragraphs 1, 2, 3, 4 and 5 of the Government's Petition in condemnation proceedings, together with the descriptions and ownerships mentioned in connection with Easements numbered 86-87, 147, 247, and 248-252, contained in said petition; together with the prayer for relief contained in said petition.

2. Order appointing Commissioners in said condemnation proceedings.

3. The preamble, the paragraphs 1, 2 and 3 of the Report & Award of the Commissioners, together with the report of said Commissioners on Easements numbered 86-87, 147, 247 and 248-252.

4. Notices of appeal by petitioner from the award of said Commissioners made in connection with Easements numbered 86-87, 147, 247 and 248-252.

5. Notices of appeal from the award of said Commissioners filed by respondents Elias A. Olson, Randor G. Karlson and Harry Brewster.

333 6. Petition for Order allowing appeal from said judgment by Elias A. Olson.

7. Amended assignment of errors.

8. Order allowing appeal.

9. Appeal bond.

10. Citation.

11. Certified copy of the order of the United States Circuit Court of Appeals consolidating said three appeals for hearing and determination.

12. Order of the court extending the time within which to file designation of the portions of the record on appeal.

13. Bill of Exceptions on said appeal.

14. The Court's certificate allowing said Bill of Exceptions.

15. This amended praecipe for transcript with proof of service.

LEWIS, HUNT & PALMER,
Attorneys for Appellants,
500 First Nat'l Bank Bldg.,
Duluth, Minnesota.

Service of the within amended praecipe for transcript is hereby admitted this 1st day of July, 1931.

DONALD D. HARRIES,
One of the Attorneys for Appellee,
1200 Alworth Bldg.,
Duluth, Minnesota.

Endorsed: Filed August 1, 1931, Joel M. Dickey, Clerk. By E. Catherine Neff, Deputy.

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334 Clerk's Certificate to Transcript.

I, Joel M. Dickey, Clerk of said District Court, do hereby certify and return to the Honorable The United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing consisting of 333 pages, numbered from 1 to 333, is a true and complete transcript of the record and proceedings in said cause, wherein United States of America is petitioner and various tracts of land in Roseau and Lake of the Woods Counties in the State of Minnesota, herein described; Oliver J. Selvog, et al., are respondents, and the whole thereof as relates to easements Nos. 86 and 87, 147, 247 and 248, as appears from the original records and files of said Court, except the original of the written objections presented by counsel for the Dominion of Canada in opposition to the offer of evidence of the value of respondents' lands for reservoir purposes; and I do hereby certify and return that I have annexed to said transcript and included within said paging the original Citation of Elias A. Olson, together with proof of service thereof.

Seal
U. S. Dist. Court
Fifth Div.
Dist. of Minn.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court at Duluth, in the District of Minnesota, this 6th day of August, A. D. 1931.

JOEL M. DICKEY, Clerk,
By E. Catherine Neff, Deputy.

Filed Aug. 10, 1931, E. E. Koch, Clerk.

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335 (Motion for Consolidation of Cases on Appeal, etc.)

United States Circuit Court of Appeals, Eighth Circuit.

On Appeal from United States District Court, District of Minnesota, Sixth Division.

Transferred to Fifth Division.

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner, respondent, and of Harry Brewster, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 248, as set forth in the said award.

and

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent, and of Randor G. Karlson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 86 and 87 as set forth in said award:

and

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent, and of Elias A. Olson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 147, as set forth in the said award.

Now come Harry Brewster, Randor G. Karlson and Elias A. Olson, the three respondents above named, by their
336 attorneys, and respectfully represent and petition the Court that the above entitled proceedings are proceedings in condemnation; that they are respectively three of the respondents in said proceedings; that appeals were conducted from the awards of the appraisers rendered in said proceedings, and that both they and Petitioner duly appeal from said awards; that said three appeals were tried together by consent and that only one record was made on said trial; that each of them has perfected a separate appeal to the United States Circuit Court of Appeals, Eighth Circuit, from the judgments entered in the trial court in said proceedings; that it is desirable and for the interest of all parties concerned that said three appeals be consolidated for hearing in the said Circuit Court of Appeals.

Wherefore, your petitioners respectfully petition and move that the Court make and file an order consolidating the said three appeals and permitting a consolidated record to be prepared and filed for the purpose of said appeals.

Dated this 30th day of June, 1931.

LEWIS, HUNT & PALMER,
Attorneys for Respondent-Appellants.

Endorsed: Motion for Order consolidating three appeals. Filed in U. S. Circuit Court of Appeals on June 30, 1931, E. E. Kock, Clerk.

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338 (Order as to Consolidation of Cases, etc.)

United States Circuit Court of Appeals
Eighth Circuit.

On Appeal from
United States District Court
District of Minnesota,
Sixth Division.
Transferred to Fifth Division.

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al, Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent and of Harry Brewster, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 248, as set forth in the said award.

and

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al, Respondents.

In the matter of the Appeal of United States of America, petitioner-respondent, and of Randor G. Karlson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 86 and 87, as set forth in the said award.

and

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al, Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent, and of Elias A. Olson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 147, as set forth in the said award.

The three appellants above named having moved the Court for an order consolidating said appeals, and for other relief, the Court being fully advised in the premises,

It is ordered: That the three appeals above entitled
339 be and hereby are consolidated for all purposes.

It is Further Ordered That a Consolidated Record for purposes of said appeals may be prepared and filed; that such Consolidated Record shall be sufficient for all purposes in each of said three appeals if it shall contain one original transcript of each of the following:

Petition and Order Allowing Appeal, Bond, Amended Assignment of Errors, Citation, Stipulation or Praecipe for

Transcript of Record, with proof of service thereof, Appellee's designation of any additional parts of the Record, the Judgment appealed from in each case, and any other stipulations, orders or other documents considered necessary to a proper hearing of said appeals by either party, including Briefs of Counsel. That said Consolidated Record be entitled and filed in the appeal of appellant Elias A. Olson, and be considered and used as having been prepared and filed in each of said appeals; and that each of said appeals be heard and determined in all respects, and with the same force and effect as though the customary and requisite papers, record and proceedings on appeal were filed and had in each of said appeals.

Dated at St. Paul, Minn., this 30 day of June, 1931.

(Motion for extension of time to file Designation of
341 Portions of Record.)

Now come the undersigned Appellant-Petitioners and respectfully represent and petition:

That appeals having been perfected to the United
342 States Circuit Court of Appeals for the Eighth Circuit in the above entitled proceedings; and the Petitioners having moved the Court for leave to file amended Assignment of Errors in said appeals; and it being impracticable to bring on for hearing their motion for leave to file their said amended Assignments until June 30, 1931, and

Whereas, the time permitted by the Court within which to file their Designation of the Portions of Record deemed necessary by them on said appeals, expires July 1, 1931, and it being desirable that Petitioners have an extension of time within which to file said Designation;

Now, Therefore, Petitioners respectfully petition and move the Court for an order extending the time within which they may file their Designation of the Portions of the Record deemed necessary by them on such appeal, to and including July 6, 1931.

Dated this 30th day of June, 1931.

LEWIS, HUNT & PALMER,
Attorney for Respondent-Appellant.

Endorsed: Motion for extension of time to file designation of portions of record. Filed in U. S. Circuit Court of Appeals on June 30, 1931, E. E. Koch, Clerk.

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344 (Order of U. S. Circuit Court of Appeals Extending Time for Filing of Designation of Portions of Record, etc.)

On motion of the above named appellants, and on cause being shown, the Court being fully advised in the premises,

It Is Hereby Ordered That the time within which said
345 Appellants may file in the Court below a designation of the portions of the record deemed necessary by them to be included in a transcript thereof, pursuant to Rule 14 of the Circuit Court of Appeals, is hereby extended to and including the 6th day of July, 1931.

Dated this 30 day of June, 1931.

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347 (Motion for Leave to File Amended Assignment of Errors.)

Now comes the undersigned Appellant-Petitioners and respectfully represent and petition the Court:

That appeals have been perfected by each of the Re-
348 spondents above named in the above entitled proceedings to the United States Circuit Court of Appeals, Eighth Circuit, and that Assignment of Errors has been duly served and filed in connection therewith; that for the purpose of presenting in a complete and convenient form before the Court and opposing counsel the facts and the portions of the record relied upon in said appeals, it is deemed advisable and necessary that amended Assignment of Errors be served and filed; that such amended Assignments may be served and filed without in any way delaying or otherwise prejudicing or complicating the hearing of said appeal;

Wherefore, your Petitioners respectfully move and petition the Court that the Court make and file an order permitting them to serve and file the one hundred forty-five consolidated Assignments of Errors hereunto attached and submitted herewith.

Dated this 30th day of June, 1931.

LEWIS, HUNT & PALMER,
Attorneys for Respondent-Appellants.

(Endorsed): Motion for leave to file Amended Assignment of Errors. Filed in U. S. Circuit Court of Appeals on June 30, 1931, E. E. Koch, Clerk.

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350 (Notice of Motion for Leave to File Amended Assignment of Errors.)

To L. L. Drill, United States Attorney, and to D. D. Harries, Special Assistant United States Attorney, Attorneys for Petitioner-Respondent:

You Will Please Be Notified That on Tuesday, June 30th, 1931, the above named Respondent-Appellant will move the court for leave to file amended Assignment of Errors in conformity with the copy thereof herewith served upon you.

You will please be notified that said motion will be brought on for hearing before the Hon. Kimbrough Stone, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, sitting in the Federal Building, at St. Paul, Minnesota, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated June 27th, 1931.

LEWIS, HUNT & PALMER,
Attorneys for Respondent-Appellant, 500 First Nat'l Bank Bldg., Duluth, Minnesota.

Personal service of the within Notice is hereby admitted this 27 day of June, 1931.

DONALD D. HARRIES,
One of the Attorneys for Petitioner.

Endorsed: Filed in U. S. Circuit Court of Appeals on June 30, 1931, E. E. Koch, Clerk.

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352 (Order of U. S. Circuit Court of Appeals Granting Leave to File Amended Assignment of Errors.)

United States Circuit Court of Appeals, Eighth Circuit.

On Appeal From United States District Court, District of Minnesota, Sixth Division, Transferred to Fifth Division.

United States of America, Petitioner;
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent and of Harry Brewster, Respondent-Appellant from the award of the Commis-

sioners heretofore appointed herein in connection with the tract and easement numbered 248, as set forth in the said award.

and

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent and of Randor G. Karlson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 86 and 87, as set forth in the said award.

and

United States of America, Petitioner,
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents.

In the matter of the Appeal of United States of America, Petitioner-Respondent, and of Elias A. Olson, Respondent-Appellant, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 147, as set forth in the said award.

On motion being made by the three appellants, above named, and on cause being shown, the Court being fully advised in the premises, all parties being represented and no objection thereto,

It Is Ordered that said appellants be and hereby are
353 permitted jointly to serve and file an amended Assignment of Errors, consisting of the 145 Assignments attached hereto, and that the same be filed and considered with the same force and effect as though the said Amended Assignment of Errors had been served and filed originally when said appeals were allowed.

It Is Further Ordered: That said Amended Assignment of Errors be included in the Consolidated Record on appeal in the three appeals above entitled, in lieu of the original As-

signment of Errors in each of said appeals, and that said original Assignments of Errors be not included therein.

Dated at St. Paul, Minn., this 30 day of June, 1931.

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1 Amended Assignment of Errors.

Filed Jun. 30, 1931, E. E. Koch, Clerk

United States District Court
District of Minnesota
Sixth Division
Transferred to Fifth Division

United States of America, Petitioner and defendant in error
vs.
Various tracts of land in Roseau and Lake of the Woods Counties, in the State of Minnesota, herein described; Oliver J. Selvog, et al., Respondents

In the matter of the appeal of United States of America, petitioner, and of Elias A. Olson, respondent and plaintiff in error, from the award of the Commissioners heretofore appointed herein in connection with the tract and easement numbered 147, as set forth in the said award.

Now comes the above named respondent-appellant and plaintiff in error, by his attorneys C. E. Berkman, John H. Hougen, and Lewis, Hunt & Palmer, and in connection with his petition for an order allowing an appeal says that in the record and proceedings and in the final judgment and decree referred to in said petition, manifest error has intervened to the prejudice of the respondent-appellant and plaintiff in error, to-wit:

1. That the court erred in sustaining petitioner's objection to the following questions and offers to prove:

Q. (By Mr. Lewis) Now, you may state, if you will, Mr. Rulien, whether there has been any considerable amount of discussion, public discussion, and general talk among the people in the Lake of the Woods County, and Roseau County, with reference to these flowage easements?

2 Mr. Harries: Just a minute. That is objected to as immaterial, hearsay and incompetent.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: We offer to show by this witness that there has been throughout Roseau County and Lake of the Woods County, on the shores of the Lake of the Woods, a great deal of public and private discussion, and common talk among people generally, regarding the flowage easements and their value.

Mr. Harries: To which we object on the ground as above stated.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Q. (By Mr. Lewis) You may state, Mr. Rulien, whether you have heard a great many people who have attended the hearings of the International Joint Commission which were held at Warroad and Baudette, and possibly at other places along the Lake of the Woods, with reference to what had been stated in those meetings? A. Yes, I have.

Q. And you may state whether it was talked among the people up there generally about what had been reported and said by the International Joint Commission, with reference to the value of these flowage easements and the lands below contour 1064?

Mr. Harries: That is objected to as immaterial and hearsay, and incompetent and irrelevant.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: We offer to prove by this witness that he has heard a great many people who attended the hearings
3 of the International Joint Commission, ever since said hearings were held in the Counties of Roseau and Lake of the Woods, in 1914, 1915 and 1916, discussing the statements which had been made by the members of the International Joint Commission and their advisors, that the flowage easement here in question, and the value of the lands below contour 1064, were very valuable.

Mr. Harries: To which we object on the ground that same is hearsay, incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Q. You may state whether there was a current and a common rumor,—by that, I mean public talk and discussion gen-

erally, with reference to the flowage easements on the lands below contour 1064, being more valuable than were the lands above contour 1064? A. Yes.

Mr. Harries: I move that the answer be stricken on the ground that it is incompetent, irrelevant and immaterial.

Mr. Lewis: Just wait for the objection, please.

The Court: The motion is granted.

(Offer of proof by Mr. Lewis—not in the hearing of the Jury).

Mr. Lewis: We offer to prove by this witness that there was at all times following the hearings held by the International Joint Commission in the counties above named, a great deal of public discussion, and current common rumor to the effect that the lands below contour 1064, and the flowage easements here in question, and the flowage rights on said lands, were of much higher value than the lands above contour 1064.

Mr. Harries: To which we object on the grounds last above noted.

The Court: The objection is sustained.

Mr. Lewis: Exception.

See Pgs. 209-211 of Settled case.

4 2.

That the Court erred in sustaining petitioner's objection to the introduction of testimony relative to the value of the flowage easements sought to be acquired, and the value of the lands in question for reservoir and flowage purposes, as disclosed by the following proceedings:

By Mr. Lewis:
Q. Will you give your full name please?
A. Bernard A. Arnesen.

Mr. Harries: Before proceeding further with the testimony of this witness, I would like permission to make to the Court a full statement of our objections to it.

The Court: Very well.

(Here followed a full statement by Mr. Harries of Petitioner's objection to evidence of the value of the flowage

easements being acquired, and the value of the lands for reservoir and flowage purposes, covering Ps. 233-242.)

The Court: I think we might as well face this situation right now, and discuss the law.

Mr. Lewis: I would agree with Your Honor, except for the fact that as we understand the law, certain questions of fact would be material in a determination of the questions of law, and it is on those questions of fact that evidence is being offered.

The Court: Yes, I understand, but of course the Government contends that the evidence you are putting in now is not competent or material on this question. We have the testimony of one witness. The Government is now moving that that be stricken out on the ground that it is not competent, and in view of the Government's position relative to that, it seems to me that we might just as well omit the rest of the testimony at this time and discuss the whole question presented. If there is any other evidence that you think the Court should have, outside of the testimony which this witness which you are putting on now, will testify to—I presume these witnesses are going to testify to their having made purchases of land below 1064 with the idea that they had a greater value than other lands up there on account of their use for reservoir purposes—of course I could receive that.

Mr. Lewis: This suggestion occurs to me in that connection, we are all interested in shortening the time and if anything develops in the argument where a question of fact becomes material, upon which there is no evidence, counsel can state to the court what the fact would be on that, and in that way probably shorten the time a great deal.

The Court: That was what I was thinking. I think we can take care of the whole thing by discussing it at this time.

(Jury retires)

Mr. Lewis: As suggested before the jury was excused, perhaps it would be helpful to the court in determining the questions of law, if I were to state on behalf of the respondents, the facts which the respondents will prove. I will state such of those facts that I consider pertinent, and if I omit any of them and they occur to me during the remarks which I shall make later, I will ask leave then to supplement this statement of facts.

The respondents will prove that the lands below 1064 and the right to flood those lands has been recognized as of high value ever since 1899, the year following the completion of the Norman Dam, and the time when the lands were first flooded. The evidence will be that the respondents, some of them, went over to the site of the Norman Dam, and that it was generally known as early as 1899 that the Canadian power companies had built the Norman Dam for power purposes, and that the cause of the lands being flooded was the fact that a dam had been built and was being used by the Canadian power Companies and that as early as 1899 it was known by the Canadian power companies were using and probably would continue to use their lands for reservoir purposes; that although the power possibilities of the Winnipeg River had not been fully developed at that time and had not been fully appreciated, nevertheless it was known in a general way that there were tremendous power possibilities on the Winnipeg River.

The respondents will prove also that very early, probably as early as 1903, 1904 or 1905, along in there, an association was formed of the property owners on the American shores of the Lake of the Woods, and that this association was organized and functioned for the purpose of obtaining just compensation from the power companies that were then flooding their lands, and also to cause the power companies, either to discontinue flooding their lands, or to arrange to pay just compensation. The respondents will prove that this association—I think the name of it at that time was the Low Water Association—that this association extended into both of the counties of Roseau and Lake of the Woods; that this Low Water Association employed counsel, and that from that time, that is, from the time of its organization, somewhere along in 1893, 1894 or 1895, down to the present time the organization of the property owners has been in existence, and that the Association has been represented at various times by a number of different counsel. I believe one of the first attorneys was a man by the name of Taylor. Shortly thereafter the property owners association or the Low Water Association was represented by Mr. Halvor Steenerson, who later became Congressman Steenerson. The respondents will show also that following the representation by Mr. Steenerson, the Honorable Charles Loring, now a member of the Supreme Court of this state, represented the property owners for a number of years I believe; and also that for some period of time Mr. G. Ahron Youngquist, now

Assistant Attorney General of the United States represented the property owners; that thereafter the property owners were represented by Mr. C. E. Berkman, an attorney now located at Chisholm, Minnesota, and who at that time lived not far from the village of Warroad; that thereafter the property owners were represented by the firm of Middleton and Middleton, Attorneys at Law of Baudette, and subsequent to the death of the younger Mr. Middleton the property owners were represented by the now Honorable Julius J. Olson of Warren, who has recently been appointed by the Governor to the District bench in that part of the state; and that thereafter they have been represented by counsel who are representing them in court in this case.

That during this entire period the property owners were all informed, and it was a matter of common talk and common discussion and common insistence through these associations of property owners, advised as they were by counsel, that the lands that were being flooded had a peculiar and a higher value because of their availability and peculiar use for flowage purposes; that that has been a matter that the property owners had insisted upon, and have had thoroughly in mind and have acted upon ever since the first flooding of their lands immediately following the construction of the Norman Dam in 1898.

The respondents will further prove in that connection that being advised as they were, such property owners as were able to do so, acquired certain of these low lands that were being flooded, for no purpose except that they were regarded as valuable for flowage purposes. We will show by a number—and we could bring in a much larger number if it meant any more—but we will show by a number of people who owned higher lands and who had their homes on higher lands, that they bought these low lands that were flooded, back some of them as early as 1915 and 1916; that they have not used those lands for any purpose except occasionally perhaps to cut hay, since the time they acquired them down to the present time; that they had no use for them; that they were bought solely because of the value which the public in that part of the country believed those lands to possess for reservoir purposes. The respondents will show that they would not have bought those low lands except for their peculiar use and value because of their availability and adaptability for reservoir purposes, and they will show that they paid a higher price for them than they otherwise would have paid if it were not for their value for reservoir purposes.

It is already in evidence, and I state this only to complete the structure of the facts in the case—it is already in evidence that as early as the time when the International Joint Commission was conducting its investigation of the value of these lands, before it could be said that even the International Joint Commission had formed an opinion as to how the lands should be handled, that the most valuable use of these low lands that were then being flooded, was their use for reservoir purposes. They had exactly the same use at that time when the International Joint Commission found that to be the fact, as they had had ever since the building of the Norman Dam. There had been no change; so if the most valuable use to which those lands could be put, and if their highest value when the International Joint Commission made that finding, was their value for reservoir purposes, it necessarily follows as an irresistible conclusion, that these lands had always possessed that value ever since they began to be flooded and began to be used for reservoir purposes.

So, if the Court please, we have got that fact fixed beyond any possibility of question or suspicion; fixed by so responsible and by so disinterested a tribunal as the International Joint Commission.

9 The respondents will prove the further fact that during all of these years there has been no market for these lands below 1064, that is, the lands that were being flooded. Such of those lands as have been bought and sold, the respondents will show, were bought and sold in almost every instance, not in the open market, but were bought and sold on distress or forced sales; that those sales could not be regarded in any way as an evidence of value.

The respondents will further show that it is the custom and practice in the hydraulic industry or profession generally, that there is no market in the accepted sense of that term, for flowage easements, or for lands that were bought for flowage purposes; that in the very nature of the industry, there cannot be a market for flowage easements or for lands for flowage purposes, for the very obvious reason that in the first place, each project, as pointed out in the objection of the Government, must depend upon the facilities of that particular project, the nearness to the market; the cost of the construction of the electric equipment; the competition which water power will have with steam or other transmission lines, and matters of that kind; and then for the very obvious

reason that in every instance where a hydraulic property is being developed, it is being developed by a concern that is owning and controlling the natural facilities. It is almost invariably the rule that before the flowage rights or the lands that are to be flooded are acquired, that the person or the corporation that is going to develop that water power project has acquired the site, the location at the Falls, and so he becomes the only person or corporation that can possibly use those lands.

These facts, if the Court please, the respondents are prepared to show by men of long experience in the power industry, both in this state and elsewhere, and I am sure will establish to the satisfaction of all, that there is no such thing as a market in the ordinary sense of the term, and that there could be no such thing.

Then, if the Court please, the respondents, as they conceive the development of their case, will urge upon the Court that in view of the fact that as early as the investigation of the International Joint Commission these lands were found to be more valuable for flowage purposes than for any other, and since that fact was recognized and insisted upon by the property owners from the very beginning of this project more than thirty years ago, and since there not only is not, but there could not possibly be a market to aid the Court in its determination of what is or what has been the fair value of these lands, we come to the next very necessary and very logical step; what was the fair value of these lands at the time that they were taken.

The International Joint Commission has found that they were more valuable than other surrounding lands; the people themselves [invisted] that they were more valuable; they bought lands in reliance on the proposition that they were more valuable and then comes the question: how much more valuable were they, and what was their value?

Upon that point, if the Court please, we will offer evidence to the Court by men whose qualifications are unquestioned, men whom the Court is already acquainted with, as to what the fair value of those lands actually was.

Taking up the discussion at that point, if the Court please, I will direct the Court's attention to the fact that the Government in this case is not condemning lands. The Government in this case is condemning a flowage easement. The treaty between the United States and Canada refers to flow-

age easements. The Act of Congress which created
11 the treaty, or carried the treaty into effect, refers to flowage easements. The engineers, when they attempted to make purchases before the condemnation proceedings, sent out letters, as we will offer to prove, in which they were offering to buy flowage easements; and so if the Court please, the inquiry in this case is not, as in the ordinary condemnation case "What is the value of lands." It is not what would have been the value of these lands the day before the condemnation, and what is their value the day after, because we are concerned with the question of what is the value of the easement, and we will prove to the Court by men who are competent to testify and to establish that fact, that the value of an easement in a bog or in a marsh is exactly the same as the value of a flowage easement on the most highly developed piece of agricultural land, or even a city lot; and so it will be the contention of the respondents in this case that the sole and only subject of inquiry in this litigation is "What is the value of the flowage easement?", and if I may be permitted to mix in something of the law and the facts in this case, in this statement that I am making, we will urge—I will say that we will urge this upon the attention of the Court—that the rule which counsel [seated] in connection with his motion, that the measure of damage is the difference between the value of the property before the easement was imposed and its value after the easement is imposed, applies not at all to the sort of thing that is now before the Court. That applies to the ordinary small condemnation for a road or a right-of-way which can be placed in one quarter section as well as another, and which takes only a part of the thing taken. It is the contention of the respondents, if the Court please, that in this case the Government is taking the whole of a certain specific piece of property. We will prove to the Court
12 as a fact that in the State of Minnesota, as well as everywhere generally, flowage easements are regarded as property. A flowage easement on a given piece of land is a separate and distinct unit of property entirely independent insofar as its valuation and its entirety is concerned; entirely independent from the value of the land upon which that easement rests. The easement itself in the State of Minnesota, and I think generally, is regarded as a distinct and separate unit of property, and so just as in a case where a condemnor takes an entire piece of property, the inquiry immediately follows: what is the value of the property taken? If the whole forty is condemned, the inquiry is not "What was the value of that forty before and after the con-

demnation'' but the inquiry is ''What was the value of that whole property when it was taken''.

And so here, inasmuch as the Government is taking the entire flowage right, this entire unit of property, the only inquiry before the Court is ''What is that unit of property worth?'' and that fact we will prove to the Court. I think that is probably as full a mixed statement of fact and law I need to make to the Court at the beginning, although I would like to ask my associates whether I have omitted anything.

The Court: Very well.

Mr. Lewis: Mr. Hougen calls my attention to the fact also that the respondents will endeavor to prove, and I think will be able to prove to the Court by competent evidence, that there is nothing in the development of the Lake of the Woods power project that differs in any way from similar developments in international waters, such for example as the development of the St. John River construction, of which there has been some discussion here in the evidence. We will prove to the Court that it is the policy of the two Governments to develop these international waters for power purposes wherever possible without interference with other rights.

13 At Mr. Hougen's suggestion also, I overlooked a point. The respondents will show that it is the custom and practice to buy and sell flowage easements as separate and distinct units of property. We will also show that these flowage easements are recorded in the Register of Deeds' Office, the same as any deed of transfer. The respondents will show also that flowage easements are taxed, by taxing municipalities, as separate units of property.

I think that that is as full a statement as I wish to make at this time. As the discussion progresses, if there are any questions of fact that appear to be material, counsel for respondents will state very frankly to the Court what we are able to prove and what we are not able to prove on those questions.

Mr. Harries: The effect of our objection may be applied to the offers of proof that have been made by counsel?

The Court: Yes.

* * * * * * * * *

Mr. Lewis: Yes. Does the Court care to hear a discussion of the law and a citation of cases at this time, and if so, which side does the Court wish to hear first?

The Court: Well, what I had in mind was this; I think I understand fairly well from what has been said here and what was said in the other case, what the Government's position is, and I thought that I would let you state as fully as you wanted to, just what your position is both as to the law and the fact, and then if Mr. Harries wishes to make a short reply, maybe we could save some time that way. We will take a ten minute recess.

(Argument by counsel on Motion.)

(And not in the presence of the Jury.)

The Court: Under all the circumstances in the case I
14 think I will sustain the objection which the Government has made to the introduction of the testimony relative to Reservoir Values, and I will strike out the testimony of William Rulien; and I will allow you an exception.

3.

That the Court erred in striking from the record the following testimony of the witness William Rulien:

Q. (By Mr. Lewis) You may state, Mr. Rulien, whether you know of any lands below contour 1064 which were bought for the purpose of taking advantage of the flowage rights on those lands, or were bought because of the flowage rights on those lands?

Mr. Harries: The question, you understand, is whether you know of any such sales?

A. Yes, I do.
Q. (By Mr. Lewis) You may tell of them.

* * * * * * * * *

Q. (By Mr. Harries) One sale that you know about?
A. Yes.

Q. (By Mr. Lewis) And who made that purchase?
A. I made it.

Mr. Harries: I move that the answer be stricken for the purpose of making an objection.

The Court: It may be stricken.

* * * * * * * * *

By Mr. Lewis:
Q. What was the condition of the land that you bought in 1916, as to the state of the water?

A. It was covered with water.
Q. 1916 was a year of very high water, was it not?
A. Yes, it was.
Q. Well, you may state whether all of the land which you bought in 1916 was below water at the time that you bought it?
A. Well, I believe it was all under water, that we could not go over it, as far as I could ascertain from standing at the nearest point, in looking it over.
Q. And for what purpose did you buy that land?
A. Well, for the reservoir purposes.
Q. Did you pay more for that land because it was below contour 1064, and because it was useful and available for reservoir purposes, than you would have paid for it, if it had not been useful and available?

Mr. Harries: That is objected to on the ground that the motive of this witness has no relevancy as to the inquiry here.

The Court: The objection is overruled.

Mr. Harries: Exception.

A. Yes, I did.

By Mr. Lewis:
Q. You say you did? A. Yes, sir.
Q. Would you have bought that land at all, situated as it was, if it were not for the fact that the land carried flowage rights, it being below contour 1604? A. I would not.

* * * * * * * * * * *

4.

That the court erred in sustaining petitioner's objection to the following questions asked of and offers to prove by the witness Harry Brewster:

Q. And your answer was what? A. 220 acres.
Q. What is the reasonable value of the flowage easement and the flowage rights on that 220 acre tract which you say is below contour 1064?

Mr. Harries: That is objected to as incompetent, irrelevant and immaterial, and not the proper measure of damage.

The Court: Objection sustained.

Mr. Lewis: We all have in mind, of course, that Mr. Brewster is the owner of the land?

The Court: Yes.

* * * * * * * * * * *

Mr. Lewis: We offer to prove by the witness, the
16 respondent Brewster now on the stand, that the reasonable and fair value, and the fair market price of the easement which the government seeks to impose upon his lands in these proceedings, is $60,000.00.

Mr. Harries: To which offer we object on the grounds last above stated.

The Court: Objection sustained.

Mr. Lewis: Exception.

* * * * * * * * * *

Q. You said that you bought something over 160 acres of land in what year? A. 1922.

Q. In 1922. For what purpose did you buy that land?

Mr. Harries: That is objected to as immaterial, for what purpose he bought land.

* * * * * * * * * *

The Court: I think I will sustain the objection to that.

Mr. Lewis: Exception. May we make an offer in that connection?

The Court: Yes.

Mr. Lewis: We offer to prove by the witness, the respondent Brewster now on the stand, that in the year 1922 he purchased 160 and some odd acres, because that tract had a value and was reputed to have a value for storage and reservoir purposes. We further offer to prove by said witness that he paid a larger price for said tract which he purchased because of the fact that it had or was reputed to have a higher value for flowage and reservoir purposes. We further offer to prove by said witness that except for the fact that said tract had or was reputed to have a higher value for flowage and reservoir purposes he would not have purchased said tract at all.

Mr. Harries: The Government * * * objects to any
17 testimony as to the motive he may have had in acquiring the same, on the ground that it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Lewis: Exception.

5.

That the court erred in striking the following testimony given by respondent Brewster as to the value of his said land before and after the imposition of the flowage easement thereon.

By Mr. Lewis:

Q. Mr. Brewster, will you state what would be the fair market value of your 220 acres which you say are below contour 1064, and upon which the Government is seeking to impose a flowage easement, before that easement is imposed upon it; that is, when you have and own the full flowage rights on these lands? A. $300 an acre.

* * * * * * * * *

Q. All right. Now what is the fair market value of those lands below contour 1064 with the easement imposed upon it?

A. Nothing. It is valueless.

* * * * * * * * *

Q. And in telling us the valuation that you put on your land per acre, what basis did you have for the figures that you named? A. For power purposes.

Q. Were those the only purposes you had in mind?

A. Yes, sir.

Mr. Harries: The Government moves that the testimony of Mr. Brewster relative to the valuation of this land be stricken.

* * * * * * * * *

The Court: Well, I think I will grant the motion of the Government at this time, and then you can examine Mr. Brewster further if you wish, Mr. Lewis, later.

18 * * * * * * * * *

By Mr. Lewis:

Q. Now, Mr. Brewster, just on that same point, when you gave us the estimate that you placed upon your land, as to its fair value, or fair market value, as it is sometimes called, you were taking all of the uses, to which your land may be put, into account, or were you just taking into account some one or more uses?

Mr. Harries: Just a moment. That is objected to as leading and suggestive, and as repetition.

The Court: Well, I think that that is rather indefinite Mr. Lewis: If he thinks that it had the same value for any other purposes, except the one that he has given, I am perfectly willing to let him so state. You say "for all purposes of value, including power purposes." Of course, it is just as objectionable, according to my theory, as it is limited to that one use.

Mr. Lewis: We don't want to try to be evasive on that matter, if the Court please. Of course, it must be conceded and respondent does concede that the land would not have that value for any other purpose except for storage and reservoir purposes. I am perfectly frank on that proposition. My thought was that the inquiry is proper as to what the value of the land is for all purposes, including what we claim the most useful purpose.

The Court: Well, I think I will sustain the objection to that, with that explanation, because it seems to me that you are simply getting back to your own proposition again, that he is testifying as to what was the market value for power and reservoir purposes.

6.

That the court erred in sustaining petitioner's objection to the following testimony and offers to prove of respondent Olson:

19 Q. Just very briefly tell the Court and the Jury what connection you had with water power over in the old country. A. I used to work on the dam construction.

* * * * * * * * *

Q. And did you learn when you were over there in the old country anything about whether the lands that were covered with water, and had formed a part of the reservoir, were more valuable or less valuable on that account, than were the other lands? A. More or less valuable, yes.

Q. What was it, more valuable or less valuable?

Mr. Harries: Just a moment. We object to that on the ground that it is immaterial.

The Court: The objection is sustained.

Mr. Lewis: We offer to prove by the witness and Respondent Olson, now on the stand, that through his employment in Norway in connection with the construction of water-power dams, and his connection with water-power projects, that he

learned that the lands used for flowage and storage purposes were more valuable on that account than were other lands.

* * * * * * * * *

Q. Did you know about the power plants that were built, and that they were operating down in the Winnipeg River?

Mr. Harries: We object to that inquiry on the ground that it is utterly immaterial, and on the further ground that the Court has ruled on the question of the admissibility of this testimony.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: We offer to prove by this witness and Respondent Olson, that before filing for the homestead which he later acquired, he had been in the City of Kenora in the Dominion of Canada, where some of the dams here in question, and which obstruct the outlet of the Lake of the Woods, had been constructed, and that he was acquainted with the fact that extensive and valuable hydro-electric power plants had been built, and were in operation in the Winnipeg River.

Mr. Harries: To which we object on the ground that the offer of that testimony is incompetent, irrelevant and immaterial, and without proper foundation.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Q. (By Mr. Lewis) Will you state, Mr. Olson, what was your intention and your purpose in filing on the particular piece of land which you did file on, and which you later acquired as your homestead?

Mr. Harries: That is objected to as immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: Respondents offer to prove by the witness and Respondent Olson that his intention and purpose in filing on the tract of land which he later acquired as a homestead was because of the fact that said lands possessed and were reputed to possess high value for flowage and storage purposes.

Mr. Harries: To which the Government objects on the ground that the motive of acquisition is immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

* * * * * * * * *

Q. Will you state to the Court and Jury what is the fair value and the fair market value of that flowage easement?

Mr. Harries: Just a moment. That is objected to as incompetent, irrelevant and immaterial, not a proper measure of damages.

21 The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: The respondent Olson being the owner of the flowage right and easement sought to be acquired by the Government, offers to prove by his own testimony that the reasonable value and market price of said easement is $16,000.00.

Mr. Harries: To which the Government objects upon the ground that no proper foundation has been laid, and upon the further ground that the proposed testimony would not be based upon the proper measure of damage in the proceedings in this court.

The Court: The objection is sustained.

Mr. Lewis: Exception.

7.

That the court erred in granting petitioner's motion to strike from the record the following given testimony and evidence of respondent Olson:

Q. For all purposes, I said; what is the value of the 56 acres of land for all purposes?
[Q.] And everything else?
A. About $300.00 an acre.
Q. $300.00 an acre? A. Yes, sir.
Q. And what is the value of that same tract of land below contour 1064, after the flowage easement is imposed upon it?
A. It will be of no value.
Q. No value? A. No value.

* * * * * * * * *

Mr. Harries: The Government moves that the testimony of this witness relative to the value of lands below contour

1064 be stricken on the ground that it is based upon an incompetent and immaterial element of damage.

Mr. Lewis: That is objected to, if the Court please, for the reason that as we understand the rule of law, the owner of land is entitled to show and to prove all uses for
22 which his lands are reasonably adaptable.

The Court: The evidence may be stricken.

Mr. Lewis: Exception.

8.

That the court erred in sustaining petitioner's objection to the following testimony and offers to prove by respondent Karlson:

Q. I see, and you know that that condition existed (flooding of this land) as far back as 1915? A. Yes.

Q. Well then let me ask you again if I may, to complete the record; why, under those conditions did you buy that 120 acres that you say you bought in 1922? A. In 1921.

Q. 1921 I mean.

Mr. Harries: Objected to as immaterial.

The Court: Objection sustained.

Mr. Lewis: Exception. The respondent offers to prove that the reason why he bought the 120 acres here in question in 1921 under the circumstances just disclosed by the evidence is because the said 120 acres was valuable and was reputed to be valuable for storage and flowage purposes.

Mr. Harries: To which the government objects on the ground that the motive of purchase is immaterial.

Mr. Lewis: Respondent further offers to prove that he paid a higher value for said 120 acre tract purchased in 1921 because of the fact that it possessed a higher value for storage and flowage purposes, than he otherwise would have paid, except for the fact that it possessed such higher value.

Mr. Harries: To which the government objects on the ground that the action of the respondent in paying more or less for his property at a given time has no bearing on the question of its value at the time of the award of the Commissioners in these proceedings.

23 Mr. Lewis: Respondent further offers to prove that at the time he purchased said 120 acre tract he purchased the same on a forced sale; that the grantor who sold

and conveyed said 120 acre tract to him was in financial distress and unable to meet his obligations, and that he conveyed and sold said tract to him under those circumstances and for those reasons.

Mr. Harries: Objected to as immaterial.

The Court: Objections sustained.

Mr. Lewis: Exception.

Q. Mr. Karlson, what is the fair value, and the fair market value of the flowage easement which the Government is seeking to impose upon your tract of land below contour 1064, which land is involved in these proceedings?

Mr. Harries: Objected to as incompetent, irrelevant and immaterial, and not the true measure of damage.

The Court: Objection sustained.

Mr. Lewis: Exception. The respondent offers to prove that the fair value of the flowage easement on the tract of land involved in these proceedings below contour 1064 is $44,000.00.

Mr. Harries: To which we object on the ground that the value of the flowage easement is not the true value, or not the true measure of the damage sustained by the respondent in these proceedings.

The Court: Objection sustained.

Mr. Lewis: Exception.

* * * * * *

Q. When you went up into that country did you hear any common report or talk among the property owners up there, and the people up there generally, with reference to the value of lands below contour 1064? A. Yes.

Q. What was that common report and talk that was
24 heard with reference to the value of these lands and the reasons for their being valuable or for their not being valuable?

Mr. Harries: Objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Lewis: Exception. One more question.

Q. Mr. Karlson, did that common report and talk and conversation about the value of these lands continue from the time that you went up there, clear down to the present time?

A. Yes.

Q. And has that common talk and report that has been abroad in that neighborhood with reference to the value of these lands been substantially the same all the time from the time you went up there in 1904, down to the present time?

A. Practically, yes.

Mr. Lewis: Respondent offers to prove that when he went to the Lake of the Woods country in 1904 he found a great deal of conversation, common report and reputation abroad, among the property owners, and among the public generally in that community to the effect that the lands below contour 1064 were very valuable for storage and flowage purposes; that the power companies were using said lands below contour 1064 for storage and flowage purposes and that said lands were more valuable for that purpose than they were for any other use and purpose; that the value of said lands for use as storage and for reservoir purposes existed at that time and that the Canadian companies which had so used said lands were then owing to the owners of said property, substantial sums of money on account of said use of their lands.

Mr. Harries: To all of which the Government objects on the ground that the inquiry is incompetent, irrelevant and immaterial, and not the proper measure of damage in this proceeding.

The Court: Objection sustained.

Mr. Lewis: Exception.

* * * * * * *

25 Q. Do you know what is the most valuable use and purpose to which these lands may be devoted?

A. Yes.

Q. What is their most valuable use?

A. For reservoir and storage purposes.

Q. Do you know now what is the reasonable market value of the use of your lands for storage purposes and flowage purposes?

Mr. Harries: Objected to on the ground that he is not competent to testify on that subject.

The Court: Objection sustained.

Mr. Lewis: Exception.

Q. You may state, Mr. Karlson, whether the value to which you testified a moment ago, is the value that is placed upon those lands generally by the people in that community who are acquainted with the lands, and were acquainted with the value and use of those lands?

Mr. Harries: Just a moment—objected to as without proper foundation, and hearsay, and incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Lewis: Exception.

9.

That the court erred in granting petitioner's motion to strike the following testimony of respondent Karlson:

Q. Mr. Karlson, will you state what was the fair market value of your lands which are involved in these proceedings before the Government imposed the flowage easement here in question upon them? A. $275.00 an acre.

Q. And what is the fair market value of these lands after the Government easement had been imposed upon them?

A. Worthless.

Q. The whole tract you say is below contour 1064?

A. Yes, sir.

* * * * * *

26

10.

That the court erred in sustaining petitioner's objection to respondent's exhibit numbered 5, and in refusing to receive said exhibit in evidence, said exhibit being an executor's deed in the usual form by R. M. Skinner, executor to W. E. McGuire, dated Feb. 21, 1930, the portion of which here material being:

"Reserving however, to the estate of Alonzo Wheeler, all claims which it now has against the United States of America, as a result of condemnation proceedings commenced by said Government in obtaining certain grants of easement to lands bordering on Lake of the Woods, in Minnesota."

11.

That the court erred in sustaining petitioner's objection to respondent's Exhibit numbered 6, and in refusing to receive said exhibit in evidence, said exhibit being a warranty deed in the usual form, by Anna McCagherty, a widow, to Lenus

Landby, dated May 26, 1924, the portion of which here being material:

"It is hereby agreed and understood by and between the parties hereto that said party of the first part reserves to herself and her heirs and assigns, an undivided one-half interest in and to any and all damages to said land that have or may have accrued, or may be assessed on account of the high water of the Lake of the Woods, and which matter of damages has been under the consideration of an International Joint Commission of the United States and Dominion of Canada."

12.

That the court erred in sustaining petitioner's objection to respondent's Exhibit numbered 7, and in refusing to receive said exhibit in evidence, said exhibit being a warranty deed in the usual form, by Frank Decker to Albertina Franson, dated August 27th, 1928, the portion of which here material being:

"Reserving flowage easements as provided by the treaty between United States and Great Britain, Feb. 24, 1925."

13.

That the court erred in sustaining petitioner's objection to respondent's Exhibit numbered 8, and in refusing to receive said exhibit in evidence, said exhibit being a Quit Claim
27. Deed in the usual form, by Russel J. Kidder to John F. Kidder, dated Nov. 19th, 1930, the portion of which here material being:

"The Grantor herein reserves to himself, his heirs, executors, administrators and assigns all claims for past damages due to artificial obstruction in the outlet of Lake of the Woods, also all claims for damages arising by virtue of the flowage easement that the United States is seeking to acquire, by reason of the raising of the level of the Lake of the Woods, and affecting said land."

14.

That the court erred in sustaining petitioner's objection to respondent's Exhibit numbered 9, and in refusing to receive said exhibit in evidence, said exhibit being a warranty deed in the usual form, by Ole S. Swanson to Emma Smith, dated January 2, 1926, the portion of which here material being:

"Said parties of the first part retain to themselves, their heirs and assigns, all rights and claims for damages which may be paid by the United States Government and the Dominion of Canada on account of high water on Lake of the Woods, arising prior to Sept. 28, 1920."

15.

That the court erred in sustaining petitioner's objection to respondent's Exhibit numbered 10, and in refusing to receive said exhibit in evidence, said exhibit being a warranty deed in the usual form, by William H. Ringling, to Ole Meland, dated October 6, 1927, the portion of which here material being:

"Said parties of the first part do hereby expressly reserve to themselves, their heirs and assigns any and all claims for damages that may have heretofore accrued to said land, or that may hereafter accrue, either for flowage easements or otherwise, on account of the fluctuation of the water levels of Lake of the Woods, the regulation of which has been established by a Treaty entered into by the Governments of the Dominion of Canada and the United States and dated on or about February 24, 1925."

16.

That the court erred in sustaining petitioner's objection to respondent's Exhibit numbered 11, and in refusing to receive said exhibit in evidence, said exhibit being a warranty deed in the usual form, by Clara A. Lockrem to L. S. Darbyshire, dated 16th day of March, 1928, the portion of which
28 here material being:

"Excepting and reserving to Clair A. Lockrem, his heirs and assigns, a flowage easement to elevation 1064 upon said lands, and any or all awards as may hereinafter be made under the Lake of the Woods Act, approved May 22nd, 1925, for a flowage easement to elevation 1064, or for such flowage easement as may be acquired under any amendatory act."

17.

That the court erred in sustaining petitioner's objection to respondent's offer of Respondent's Exhibit 1, the material portions of which are:

"Application

To the Honorable the International Joint Commission:

Application made by Saint John River Power Company (Hereinafter called the Applicant) for permission to construct and operate certain permanent works in and adjacent to the channel of the River Saint John in the Province of New Brunswick at a point on or near the said River known as Grand Falls; respectfully sheweth:

1. Status of the Applicant.

The Applicant is a Corporation duly incorporated by special Act entitled "An Act to Incorporate Saint John River Power Company" passed by the Legislative Assembly of the Province of New Brunswick during the session held in the present year, a copy of which with the exception of Schedules A, B, C and D thereto, is set forth as Appendix I hereto.

* * * * * * *

"5. The Company may generate, purchase or otherwise acquire, sell, transmit and distribute electrical power and energy, and specifically, but without limiting the generality of the foregoing, the Company shall have full right and authority to develop hydro-electric power on the Saint John River at or near Grand Falls and for that purpose to divert and regulate the flow of said river and its tributaries
29 both above and below its works, to such an extent and in such manner as it shall deem necessary, and also full right and authority to develop water storage and regulation thereof in New Brunswick and beyond its borders and in inter-provincial and international boundary rivers and streams, and to construct, maintain and operate transmission and distribution systems for such power anywhere in New Brunswick and to points beyond its borders; provided, however, that the Company shall not export electrical power or energy beyond the limits of Canada except to the extent necessary to comply with any order of the International Joint Commission appointed pursuant to the Treaty between the United States of America and Great Britain dated the 11th day of January, 1909, unless and only to the extent that such export shall be approved by the Lieutenant-Governor-in-Council."

* * * * * * *

3. General Description of Project.

The applicant proposes to develop the natural water power at Grand Falls for the production of hydro-electric power.

The power development project, as now conceived and planned, will involve the construction of storage dams at various points within the tributary basin and the ultimate capacity of the development is contingent upon the ultimate extent to which the dependable flow of the Saint John River above Grand Falls may in the future be progressively increased, through the agency of artificial storage.

The power site of Grand Falls lies wholly within the Province of New Brunswick, about three miles below the point at which the line of the international boundary intersects the medial thread of the River Saint John, and all the works and structures incidental to the initial phases of the project are in Canadian territory.

5. Effect of Proposed Works on International Waters.

The effect of the proposed works on international waters will be identically the same as the effect of the proposed works of the New Brunswick Electric Power Commission would have been and is as follows:

By means of the main dam above described it is proposed to hold the upstream pondage at an operating level corresponding to high water mark at Grand Falls, but at no time above such elevation.

During the freshet period, the river will rise to high water stage through the ordinary natural process as heretofore, but during the low water period the effect of the dam at Grand Falls will be to still maintain the high water stage in the immediate vicinity of the dam, and pond the water back for about thirty-two miles at an elevation somewhat above low water mark, but at the same time always below high water mark. The condition described is plainly indicated in the profile sheet, Plan No. III, submitted herewith.

* * * * * *

It will be seen that at the point where the ponded flow meets the international boundary, it is about sixteen feet above the natural minimum, and about four feet below the natural maximum water level. This relationship is seen to become gradually modified as the pondage extends upstream; until at Van Buren, Maine, the ponded level is only twelve feet above low water mark, and about fourteen feet below the natural maximum water level and finally reaches a point near St. Basil, New Brunswick, where the two levels coincide.

It is therefore evident, that the only land adversely affected at any point within the ponded reach is the riparian

strip below low and high water mark. The total area actually submerged at low stages of the river is eight hundred acres of which four hundred acres are in Canada and four hundred acres are in the State of Maine. This area includes, in addition to arable lands, a considerable acreage of sand and gravel bars exposed at periods of low discharge.

31 The extent to which arable lands below high water mark are affected is more clearly shown on Plans No. IV to X inclusive, these being large scale plans covering successive portions of the ponded reach and upon which are shown the contours on both banks of the river, and a flow line in red showing the relative positions of the present permanent shore lines and the new shore lines which will result from the creation of the proposed pondage.

The Applicant is fully aware of the fact that the above described use of international waters is subject to a prior right in respect of navigation and other uses, and in connection with the same it is submitted that the proposed raising of the level in the ponded reach, together with the general improvement in flow regulation, through the agency of artificial storage, will jointly effect a more efficient dilution of sewage wastes, provide a purer and more abundant water supply at all stages of flow, and improve navigation not only in respect to ferries and other small craft on the ponded reach, but on all sections of the Saint John River below the confluence of tributaries whereon storage dams may be located.

The progressive development of artificial storage will likewise in corresponding degree reduce flood damage and promote the interests of log driving by extending the season, improving the difficult reaches, and providing greatly improved facilities for booming and sorting.

Inasmuch as the project in question involves the placing of an obstruction in waters below the international boundary which will affect the level of waters above the boundary, and the flowing across the same, it is the opinion of the Applicant that your Honorable Commission may have jurisdiction in the premises, under the terms of Article IV of the Boundary Waters Treaty.

This Application is therefore respectfully submitted for your consideration.

32 Petition. The applicant does now pray for such order, ruling or decision, authorizing and empowering the Applicant to proceed with the said works as may in the opinion of your Honorable Commission be required by the

"Waterways Treaty Act" together with such provisos as may be deemed fitting in the premises.

All of which is respectfully submitted.

BROWN, MONTGOMERY & McMICHAEL DAVIS, POLK, WARDELL, GARDNER & REED,
Solicitors for Saint John River Power Co."

"Order

Whereas the Saint John River Power Company (hereinafter called "The Applicant") has presented to and filed with this Commission plans of certain permanent works (hereinafter referred to as "the said works") for the development of hydro-electric power in and adjacent to the channel of the River St. John in the Province of New Brunswick at a point in the said river known as Grand Falls, and has applied for approval of the said works and authority to proceed with the construction of the same under the provisions of the Treaty between the United States and Great Britain relating to boundary waters and questions arising between the United States and Canada of the 11th day of January, 1909; and

Whereas, the power site of Grand Falls shown on said plans and described in said application lies wholly within the said Province of New Brunswick about three miles below the point at which the line of the international boundary intersects the medial thread of the River St. John, and it is proposed to create and maintain a ponded area in the said river for a distance of approximately thirty-two miles above said Grand Falls, approximately twenty-nine miles of which ponded area is in that part of the river along which the international boundary between the United States and the Dominion of Canada passes; and

* * * * * *

33 Whereas, the present Application came on for hearing at the city of Washington in the District of Columbia on the 28th day of June, 1926, after due notice to all parties interested in both countries of the filing of said Application and of the time and place of said hearing; when evidence was adduced and counsel heard on behalf of all parties; and

Whereas, the Applicant has entered into an agreement with Madawaska Company (the successor in interest to St. John Lumber Company) covering the same subject matter as

was covered in the agreement between the New Brunswick Electric Power Commission and Saint John Lumber Company attached as Schedule A to the above mentioned order of this Commission dated the 22nd day of June, 1925, and a copy of said agreement has been communicated to this Commission, and contains provisions involving possible future references to this Commission; and

Whereas, the Applicant has entered into an agreement with Bangor and Aroostook Railroad Company and Van Buren Bridge Company covering the same subject matter as was covered in the agreement between the New Brunswick Electric Power Commission and said Companies attached as Schedule B to said Order of this Commission and a copy of said agreement has been communited to this Commission and contains provisions involving possible future reference to this Commission; and

Whereas, the Applicant has not yet effected a settlement with certain other owners of property which it is alleged will be taken or injuriously affected by said works, but has intimated that it expects and intends to do so; and

Whereas, conditional on this Order being granted, the agreement between Grand Falls Company, Limited, and the International Paper Company and the New Brunswick Electric Power Company, Commission attached at Schedule C to said Order of this Commission has been cancelled by the parties thereto; and

Whereas, at the hearings on the above mentioned Ap-
34 plication by the New Brunswick Electric Power Commission counsel for the United States claimed that the United States is entitled to a certain percentage of the power to be developed at Grand Falls as aforesaid, and the Dominion of Canada and the Province of New Brunswick denied this right; and

* * * * * *

Whereas, the members of this Commission after having read the letters addressed to its Chairman from the Premier of New Brunswick and the Chairman of the New Brunswick Electric Power Commission and from the Grand Falls Company, Limited, and International Paper Company referred to in the Application in this matter, and also letters to the Chairmen of this Commission from the Attorney General of the State of Maine, from the Bangor and Aroostook Railroad

Company and Van Buren Bridge Company, from Madawaska Company, from the Canadian National Railways and from the Canadian Pacific Railway, and after having read the agreements above referred to, and after having heard the evidence adduced and counsel for the Applicant, the United States, the Bangor & Aroostook Railroad and Van Buren Bridge Company, the Canadian National Railways and the Canadian Pacific Railway, and after having considered the matters above recited, have determined that the said works should be approved and authority given for the construction thereof pursuant to said Treaty, subject to the conditions hereinafter set forth.

1. This Commission Therefore Orders And Directs that the said plans be and the same are hereby approved, and the construction and operation of works in accordance therewith authorized under the provisions of said Treaty, upon and subject to the following conditions:

(1) That this Commission reserves to itself the right to take jurisdiction in the instances mentioned in the above mentioned agreements of the Applicant with Bangor and Aroostook Railroad Company, and Van Buren Bridge Company, and with Madawaska Company.

(2) That the said Applicant make suitable and adequate provision, to the satisfaction of this Commission, for the protection and indemnity against injury of all other interests on either side of the boundary.

(3) That the said works shall have such discharge capacity and be so constructed as to permit the passage of water at all flood stages in no less quantity than would pass down under natural conditions in the international section of the river, and whenever the flow of the river exceeds the discharge through the power house to such an extent as to cause the ponded level of the water surface immediately above the dam to rise above elevation 427.26 (mean sea level datum) being the operating level shown on sheet number 3 of said plans—the sluices and other works for the passage of water shall be so operated as to provide for the passage of the river flow until the water level at the dam falls to said elevation.

2. And This Commission Doth Hereby Reserve to the Applicant and to all parties having claims for injuries in respect of said works other than the parties to said agreement the

right to apply for such further order, direction or action with reference to such claims as may seem proper.

3. And This Commission Also Orders And Directs, in accordance with Applicant's suggestion in that respect set out in Section 2 of it Application, that the Applicant execute and deliver to International Paper Company an agreement in substantially the form appearing as Schedule A hereto and covering the supply of 2,000 H. P. of energy for use in the United States, it being understood that this condition is being imposed in order that the position of the United States and of the State of Maine on the one hand, and that of the Dominion of Canada and Province of New Brunswick on the other hand, shall be substantially the same under this Order as under the above mentioned Order of this Commission dated the 22nd day of June, 1925. But should the
36 above mentioned 2,000 H. P. cease to be available for use in the United States at any time for any reason this Commission reserves the rights of the parties to reopen the question and ask for a decision on the contentions of the United States and the State of Maine, and of the Dominion of Canada and Province of New Brunswick advanced at the hearings of this Commission on the above mentioned application of the New Brunswick Electric Power Commission, held at Van Buren, Maine, on the 25th day of March, 1925, and at Montreal on the 15th and 16th days of May and the 12th and 13th days of June, 1925. And until this Commission renders a decision on such questions the Applicant shall make available at least 2,000 H. P. for use in the United States upon receiving reasonable notice in writing requiring it so to do unless relieved by order of this Commission from so doing. Liberty is hereby reserved to the Applicant from time to time and at any time to apply to this Commission for relief from said requirement.

4. And This Commission Doth Further Order And Declare that nothing in this Order contained, in the recitals or elsewhere, shall by implication or otherwise be construed or taken as an expression of opinion on the part of the Commission with reference to the contentions above recited or as a recognition in any way of the principles contended for by counsel for their country at the hearings above mentioned.

Dated at Washington, D. C., this 28th day of June, A. D. 1926.

C. D. CLARK
C. A. MAGRATH
FRED T. DUBOIS
H. A. POWELL
P. J. McCUMBER
W. H. HEARST."

37 18.

That the Court erred in sustaining petitioner's objection to Respondent's Exhibit 32 being the volume of final arguments before the International Joint Commission, the material portions of which are:

"Mr. Tawney: Mr. Chairman, I desire to say that this arrangement was made in the absence of the chairman yesterday, and the reason for the arrangement is that the power interests involved in this investigation are the paramount interests so far as dollars and cents are concerned, and, following the analogy of condemnation proceedings, the party seeking to invoke the exercise of the power of eminent domain is usually the one that proceeds first and sets forth the reasons for the exercise of that power. While this is not by any means a condemnation proceeding, it is analogous. For that reason the commission concluded that inasmuch as the power interests were the paramount interests and would be the chief beneficiaries in the utilization of the waters of the lake and waters flowing into and from the lake, the burden should be on them to present their case, and then the other interests, after hearing the arguments of the power interests, could follow.

* * * * * * *

(By Hon. C. J. Rockwood, member of the International Joint Commission.)

"The one thing it seems to me that this commission should do is to see that it does not do anything that will tie the hands of the next generation and limit the possibilities of this water power. Every inch of elevation that can be added, if it can be used once a year, equals in the neighborhood of $100,000 in value every inch. The addition of a foot, if it is utilizable, adds in the neighborhood of a million dollars, computing power at $10 per horsepower. The values and the possibilities are simply beyond the conception of any of us, and the one thing most of all that should be in the minds of this commis-

sion and of everyone who acts with any responsibility
38 toward this development, is to see that nothing is done and nothing is permitted to be done that will tie the hands of the future."

* * * * * *

(By Isaac Campbell, K. C. representing the power interests of the City of Winnipeg).

* * * * * *

For that additional level and for the foot or two feet in height of contour, the lands falling within an additional contour of a foot and a half, we should pay, and we should pay in full, although the riparian owners may for several years out of 25 be able to make some use of that foot or 1½ feet. But if they are liable to have it flooded 1 year out of 25, or 3 years out of 25, we can not with very good grace, nor with justice, and, I think, not within the law, object to paying them for the full value of the land; and in recommending that value, it seems to me that you are not limited to the strict market value, not only the 10 per cent spoken of today, but 20 or 25 per cent might be added.

* * * * * *

As to making the compensation, we should be willing to pay fairly and in that sense liberally for the land that is injured, and that would be either condemned or taken over or whatever would be the procedure that would be adopted.

Mr. Mignault: When you say "we" whom do you mean?

Mr. Campbell: The Canadian power interests, the Dominion Government, so far as they own the power, and those that are now allotted or in use; and I am speaking for the community of the city of Winnipeg and I think we ought to pay a fair share, our full share and that there is no objection to its being computed fairly, and liberally, not put at the exact market value of 10 per cent, but at 20 or 25 per cent, that could with safety be added to what would be the estimated market value. And, more than that, that value should, as soon as your report is acted upon, be paid, then; that is, be paid now without waiting until the time comes when we will need to raise the water. We do not need to raise it now. We do not need any regulation now. My clients can get along if the Lake of the Woods were treated as now, and they
39 probably will for 8 or 10 years be able to do so. But it is not desirable that either the riparian owners or ourselves should be in doubt about the legal height of the

water available. It is not fair to them and not fair to us, and I think we should pay the full amount of the compensation that should be charged against us—pay it now, and although interest would be running on the money it would be avoiding trouble and doubt and anxiety, which would be well worth the use of the money, although you would not have the use of the added amount of water."

(By Mr. D. H. Laird, representing the Winnipeg Electric Railway Company and Winnipeg River Power Company.)

"As power users, we desire that higher level, and, as indicated by Mr. Campbell and Mr. Rockwood, the power users consider that adequate and full compensation should be made to the landowners for the land necessarily taken for that higher level; but the method of levying that compensation upon the power users, of course, is a purely domestic matter. If the power users in Canada get the benefit of it, I have no doubt that the Canadian authorities would see that they would pay it ultimately. We are vitally interested in the best use of those waters. We have invested now in the plant in Winnipeg millions of dollars. The direct investment at the power plant is very large, $6,000,000 at the power plant alone, and then we have all the investment in Winnipeg systems there, all dependent upon this power. Then we have spent $60,000 in the development of the new site at Great Falls. That contemplates an expenditure of seven million or eight million dollars for the ultimate development of that site. Our interest is very, very great in the most advantageous uses of those waters."

19.

That the court erred in sustaining petitioner's objection to respondent's offer to prove that:

Mr. Lewis: The respondents also offer to prove that
40 the publications and the arguments and facts contained in the arguments, as set forth in Respondent's Exhibit 32, were circulated among the property owners here in question, and the public generally in Lake of the Woods and Roseau Counties, and that the facts contained in these arguments were known by the property owners and the public generally in the two counties.

20.

That the court erred in sustaining petitioner's objection to respondent's offer of Respondent's Exhibit 33, presented to the International Joint Commission, being the brief by Hon. C. J. Rockwood, counsel for Minnesota & Ontario Power Company, and other allied companies. The portions of said Exhibit here material are:

"Added Power.

The river which flows out of Lake of the Woods is a great source of power, and the lake without artificial improvement is a great benefit to the river as a producer of power; but I shall point out that the control of the lake and of the waters that flow into it have added or will add not less than 100,000 continuous horse powers of energy to that which could be produced without such control. Perhaps much more could be accomplished. I shall deal only with the minimum.

"Value of Power.

These 100,000 horse power are, except in the matter of intelligence, equal to the labor of not less than a million men. Their work is perpetual. They produce power at a fraction of the cost of power from other sources. They do not perish with the using.

I reproduce from Water Resources Paper No. 3, page 274, a table of comparative costs of power in the City of Winnipeg:

41 Table 42. Comparison of the Cost of Fuel Power in Winnipeg with power from Pine Falls.

	Capital Cost Installed Complete	Per Horse-Power Year Load Factor			Per Kilowatt Hour Load Factor		
		25%	50%	75%	25%	50%	75%
250 H. P.	$	$ ¢	$ ¢	$ ¢	Cents	Cents	Cents
Steam	22,500	60.00	100.00	134.00	3.64	3.06	2.73
Diesel Oil	30,000	37.00	58.00	78.00	2.28	1.77	1.59
Producer Gas	27,500	47.00	77.50	108.00	2.88	2.37	2.20
Hydro-electric							
Initial	6,000	15.00	15.35	15.70	0.66	0.57	0.54
Complete	6,000	13.30	13.70	14.00	0.60	0.51	0.48
500 H.P.							
Steam	42,500	52.50	87.50	115.00	3.22	2.68	2.32
Diesel Oil	55,000	35.50	55.50	75.50	2.18	1.70	1.54
Producer Gas	50,000	42.50	70.00	97.00	2.60	2.13	1.97
Hydro-electric							
Initial	12,000	15.00	15.35	15.70	0.66	0.57	0.54
Complete	12,000	13.30	13.70	14.10	0.60	0.51	0.48

42 "The Effect of Regulation.

It is disclosed by the actual surveys reported in Water Resources Paper No. 3, pages 224, 234, 258, that any development of two power sites, Lower Seven Sisters and Upper Seven Sisters, is from a practical point of view dependent on complete regulation of flow. With complete regulation, the first of these has a capacity of 37,900 horse power with wheels of 75 per cent efficiency, and the second 29,600 horse power with wheels of the same efficiency, or an aggregate of 67,500. This power is wholly lost by absence of complete regulation.

Estimates of water power capacity are traditionally based upon 75 or 80 per cent wheel efficiency. It is safe now to depend upon 90 per cent. This change in basis of efficiency would add 2,857 horse power to the 22,860 and 13,500 to the 67,500, making respectively 25,717 and 81,000 or an aggregate of 106,717 produced by further regulation."

"Total Effect.

Taking all the items of gain into consideration, the total result of complete regulation may safely be estimated at not less than 115,000 horse power, and probably as high as 125,000 in addition to making present regulation lawful beyond question.

The Value of Regulation.

Using the smaller figure, 115,000 horse power, as the result of regulation, and the low estimate of ten dollars per annum as the value of a horse power, the result is $1,150,000 per annum, or interest at five per cent upon $23,000,000.

43 That ten dollars is not a high estimate of the value of a horse power, is shown by the comparison of costs of hydro electric and other sources of power found in Water Resources Paper No. 3, page 275; and that the actual development and use of this power in the not distant future is a practical certainty, is shown by the fact that over 85,000 horse power have been actually developed at Kenora, Keewatin, Piniwa and Point du Bois, and that, except for the war, work would have been fairly well under way before now on the development of another 1,000,000 horse power at the Du Bonnet Falls site.

The prediction would have seemed fanciful if made twenty-five years ago that this actual development would have occurred or would have been considered within this period."

* * * * * * *

"Water Power Property.

A water power property consists not only in the riparian ownership of land suitable for the construction of a dam. Equally necessary or other property rights, such as flowage rights.

* * * * * * *

The land necessary for this is part of the water power property. The site for a storage reservoir, although remote, is equally a part of the water power property.

* * * * * *

In the case of the Winnipeg River, the remotest and smallest reservoir site in the hills of the northeastern Minnesota, or across the line in Ontario, is as necessary to the full development of the water power property whose wheels are to be turned at Du Bonnet Falls, as is the location for the dam and power house itself. * * * *

44 Likewise of every intermediate reservoir, Lake of the Woods, Rainy Lake, Lake Namakan and all the rest. From time immemorial American law, and doubtless also Canadian law, has permitted the acquisition by compulsory process of these collateral properties as an aid in the development of water power.

In the United States, where the federal constitution and every state constitution permits the exercise of the power of eminent domain for public purposes only, some of the states have so defined the term "public use" as to exclude ordinary manufacturing enterprises and limit the term to such uses as the public would have some direct participation in."

* * * * * * *

"What Shall the Maximum Be?

Value of Stored Water.

The quantity of water found in a single foot in depth of water on the surface of the Lake of the Woods will create in its fall to Lake Winnipeg 39,480 horse power continuous for one year with wheels of 80 per cent efficiency, and 44,415 horse power with wheels of 90 per cent efficiency. The commercial

value at $10 per horse power per annum is $394,800 in one case, and $444,150 in the other. The capitalized value, if this use can be repeated once every year, is from eight to ten million dollars.

It seems to be assumed in the engineers' testimony, February, 1916, meeting, page 214, that at least one hundred billion cubic feet of storage will be created in Rainy Lake and above, and it is contemplated that one hundred fifty billions may be created. The commercial value of the flow of fifty billion in its fall to Lake Winnipeg would be from five hundred to five hundred fifty thousand dollars, and the capitalized value, if it can be repeated once each year, will be from ten to twelve million dollars."

45 "Value in Future.

It is a moral certainty that the time will shortly come when this power will have twice the value that is now estimated. Using the cost of coal as basis, it has more than twice that value now. These values are so great and so certain of realization that any and all damages suggested, in the highest and wildest estimates, are puny in comparison.

As soon as the demand appears for power on the Nelson River, and it is sure to appear soon, the figures used above to express the results and values must be doubled and trebled. To hesitate in the expenditure of a few hundred thousand dollars, for the cost of flowage rights and protective works, would be nothing less than crime against succeeding generations."

21.

That the court erred in sustaining petitioner's objection to respondent's offer to prove that the information and facts set forth in this printed brief, Respondent's Exhibit 33, were circulated among the residents of Lake of the Woods and Roseau Counties, and were known by such residents and by the property owners generally in those counties.

22.

That the court erred in sustaining petitioner's objection to respondent's offer of Respondent's Exhibit 36, being an editorial in Manitoba Free Press, of the city of Winnipeg, under date of June 3, 1922, the material portions of which are:

"To the Manitoba power plants on the Winnipeg river, present and prospective, it is vitally important that there should be a regular, dependable flow of water. Winnipeg's

municipal power scheme, the Manitoba Power Company's hydro-electric enterprise, the Winnipeg Electric Railway Company, and all future power concerns would be directly
46 affected if Mr. Backus were allowed to use the flow from the Lake of the Woods, as he proposes, or else to levy a toll, as he would be in a position to do, on the Manitoba power companies for allowing the flow which they required. Rates for light and power would have been forced up and the advantage which this city possesses with its exceedingly cheap power for industrial purposes would have been considerably discounted. But the "dependable flow" was not only desired by Manitoba, but was clearly by highly competent authorities to be the best system for Ontario also."

"Mr. Backus' interests last year fought against this restriction with all the resources at their command. They claimed that they could not properly carry on their proposed pulp industry at the Lake of the Woods if the 'dependable flow' plan were adopted and they could not have, intermittently, the maximum flow." * * *

"It is supposed that Premier Drury in re-introducing his bill thinks that he can secure enough support in the Legislature this time to carry it. If he does, the situation in regard to power development in the Lake of the Woods District will be definitely settled. Power development in Manitoba will also, as a result be able to go ahead without the menace of serious interference with the flow in the Winnipeg River or of the necessity of paying tribute to Mr. Backus. Mr. Backus will be able to proceed with his enterprise, forgetting about the imaginary handicap to which he says he is being subjected. And Mr. Peter Heenan, M. L. A. and his constituents in Kenora will realize in time that they are not going to suffer as a result of the regulating of power development in the manner proposed, but that their town and district will benefit from the control and protection that is being provided."

23.

That the Court erred in sustaining petitioner's objection to respondents' offer to prove that said editorial, Respondents' Exhibit 35, and the facts recited therein, were known to and discussed by the people living in Lake of the Woods and Roseau Counties.

24.

That the Court erred in sustaining petitioner's objection to the whole of respondents' Exhibit 34, being respondents'

offer to prove certain facts by the witness Adolph F. Meyer. Said exhibit was prepared and offered by respondents pursuant to order of the court made on motion of petitioner, after the Court had sustained petitioner's objection to oral testimony by Mr. Meyer. Said exhibit contains several offers of proof. Although the trial court excluded the entire exhibit, he expressly permitted his ruling and respondents' exception to apply separately to each separate offer of proof. Accordingly, for brevity and convenience, each offer contained in said exhibit, the rejection of which is assigned as error, will be given a separate assignment number on the margin hereof, without repeating in each instance the formal language assigning error.

47

The same procedure is followed with reference to the court's exclusion of respondents' Exhibit 35, 42 to 51 inclusive, and Exhibit 55. For the court's convenience petitioner's objections to the several offers are set forth verbatim.

25.

"Adolph F. Meyer.

"Respondents offer to prove by the witness Adolph F. Meyer that there are opportunities for the development of hydro-electric power at the outlets of the Lake of the Woods and in the Winnipeg River, which developments will derive substantial benefits from the utilization of the water storage of the Lake of the Woods reservoir, at the following sites:

Outlets of Lake of the Woods, with a head of 22 feet;

White Dog Falls and Boundary Falls, with a head of 45 feet;

Point Du Bois, with a head of 46 feet;

Slave Falls, with a head of 26 feet;

Seven Sisters, with a head of 66 feet;

McArthur Falls, with a head of 18 feet;

Great Falls, with a head of 56 feet;

Pine Falls, with a head of 37 feet.

That the total concentrated head of all of sites is 316 feet.

Mr. Harries: Subject to the right to make additional objections, with respect to the matters contained in the three

additional pages, which counsel has just handed to the Government counsel, the United States objects to the reception of the testimony of Adolphh F. Meyer upon the grounds stated in those two sheets attached to the copy of Mr.
48 Meyer's testimony, which are now presented to the reporter.

(Document marked General Government's Exhibit 98 for identification by the reporter.)

The Government objects to each item of the foregoing proposed offer of proof by respondents upon each of the following grounds as to each item of such offer or proof:

The objection on the part of the United States to the admission of such evidence is made upon the following grounds:

1. That such evidence is incompetent, irrelevant and immaterial.

2. That such testimony is highly speculative and conjectural for the following reasons:

(a) It erroneously assumes as an existing fact fixed costs of plant site, operation, personnel, taxes and finances without basis other than conjecture and speculation.

(b) It assumes as a fact that the full development of the power which such a reservoir is capable of producing and also erroneously assumes a market for the said power so assumed to be developed as a result of the assumed use of said basin and respondents land as a part thereof.

(c) It assumes the earning of large profits from the use of the power so assumed to be developed and used.

(d) It assumes the practicability of united in one ownership approximately 1573 separate parcels of land without the exercise of eminent domain.

(e) It erroneously assumes the full development of all the power of which said reservoir is capable and also
49 the constant employment of the same on [an] basis and fixed profit.

(f) It excludes the use of said power which said body is capable of producing under full development for municipal or other public purposes on a cost basis or small margin of profit.

3. That no sufficient foundation has been laid for the introduction of said testimony.

4. That such testimony does not go to the true measure of damages in this case; namely, the difference in market value of the property affected by the easement before and after such easement is imposed.

5. That such testimony presupposes and assumes as status of the titles to the said lands at variance with the status thereof at the time of the condemnation; that is to say, at the date of the filing of the awards of the Commissioners.

6. That respondents have not sustained the burden of first proving the practicability of unifying shore ownerships, as required by law.

The Government further objects to any such evidence upon the further grounds:

1. The multiplicity of titles to lands affected by petitions of the Government for condemnation pursuant to the treaty between the United States and Canada makes it utterly impracticable as a matter of law to unite them for reservoir purposes, except through the intervention of the power of eminent domain.

(a) The physical magnitude of the project embracing 78,081 acres of land distributed along a shore line of over 1500 miles of mainland shoreline, the ownership of 50 which is reposed in approximately 850 recorded fee owners of lands in the United States of whom many have died, leaving unknown heirs, or have disappeared to parts unknown, and approximately 723 private owners in the Province of Ontario, render the exercise of the power of eminent domain the sole practicable means of so regulating or lawfully affecting the levels of the lake.

2. Similarly, the multiplicity of titles to the land affected in this proceeding, pursuant to the said treaty between the United States and Canada makes it utterly impracticable as a matter of fact to unite them for reservoir purposes save by eminent domain.

3. The ownership by the United States of a vast acreage ranging from approximately 50,000 acres when the lands in question were first opened for entry to 11,000 acres of land at the time the present proceedings were instituted rendered it impossible for any private interest to acquire and exercise a lawful right to flood the margins of the lake or otherwise control its levels.

(a) The homestead law, (43 U. S. C. A. Sec. 162) Provides that lands in the public domain must be taken for the purpose of actual settlement and not for speculation.

(b) The Act of Congress of January 14, 1889, entitled "An Act for the relief and civilization of Chippewa Indians in the State of Minnesota," (25 statutes at large 644) provides that the agricultural lands acquired under the act "shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law."

51 4. That the ownership of a large part of the lands necessary for such reservoir and owned by the Province of Ontario, the Policy of which province is opposed to the acquisition of any exclusive right of control of power sites and said lake levels, render it extremely unlikely, if not wholly impossible, to acquire flowage rights on the Canadian shore.

5. That the shore lands bordering on the Lake of the Woods have been continuously subject to four separate governmental jurisdictions until July 15, 1930, and since that date subject to five governmental jurisdictions, each charged with the duty of protecting its own interests therein and to preserve and perform its own administrative policies, making it wholly impracticable for private interests to acquire flowage rights thereon.

6. That the Lake of the Woods is international and navigable boundary water, the right to regulate and control which reposes solely in the United States and the Dominion of Canada.

7. That under the laws of the Dominion of Canada the Lake of the Woods, at least to the extent thereof within the boundary of the Dominion of Canada, is wholly subject to the jurisdiction of the Dominion Government for the protection of navigation thereof.

8. The structures on the Lake of the Woods outlets controlling the regulation of the lake have been under government control from 1898 to the present time for the protection of navigation and this physical control of such outlets by a governmental agency in the interests of one of its prime functions, precludes the possibility of control of the lake levels by any other agency or interest.

9. The Lake of the Woods has been subject to inter-
52 national commitment, regulation and control since the treaty of 1909 with Great Britain, which estab-

lished the order of precedence of the various interests, with power in fourth place.

10. All Crown lands in the Provinces of Manitoba and Ontario were withdrawn in 1915 and 1920 from any disposition inconsistent with governmental control and regulations.

11. The Indian Act of the Dominion of Canada, requiring a majority consent from each band located on Indian reservations adjacent to said lake, of which there are [forth] in number, renders it wholly impracticable and unfeasible to contemplate successful negotiations with said Indian occupants leading to their consent to relinquishment in their reservations.

12. The interests on the part of those concerned in the level of the Lake of the Woods are varied and embrace navigation, fishing, lumbering, domestic and sanitary purposes and power and these interests require radically different stages and conditions of the levels of said lake, and because they are so radically different one from another they preclude the reasonable expectation that the same could be reconciled by any persons or concerns other than governmental authority.

13. Respondents' testimony on the reservoir value is inadmissible until proof is made of a reasonable possibility of uniting in one person or firm.

(a) Power to unify shore ownership.

(b) Right to control the levels of the lake.

(c). Physical control of the outlets of the lake, each of which it is absolutely impracticable to so much as contemplate except by the joint action of the National Sovereignties having jurisdiction of the Lake of the Woods.

53 14. That it is impracticable as a matter of law for any power interest to unify ownership on the margin of said lake because of the law of the State of Minnesota (Sections 8076 and 8077, Mason's Minn. Stat. 1927), forbidding foreign interests to acquire more than 90,000 square feet of land in Minnesota.

On the ground that it conclusively appears that the regulation of the levels of said lake can be maintained or controlled only by governmental agency and by the exercise of the power of eminent domain. In connection with this ground objection in addition to other matters before the Court, there is called to the attention of the Court:

1. Section 10437, Mason's Minn. Stat. 1927, providing that to drain or attempt to drain in any manner any lake or body of water meandered by the United States is a gross misdemeanor, and also,

2. Article 2, Section 2 of the Constitution of Minnesota and the Enabling Act of 1857, page XII, Mason's Minn. Stat. 1927, to the effect that water forming boundaries with other states shall be common highways and forever free.

Further in this same connection, attention is called to the Acts of Congress approved June 7 and July 1, respectively, 1898, (30 Stat. 67, 571, 576) expressly reserving to the United States the right to flow the lands involved herein without any liability therefor to any person so acquiring said land thereafter.

Objection is further made to the introduction of such evidence for the reason that even if it be assumed that the said Acts June 7 and July 1, 1898, respectively, are impliedly repealed by the Treaty of 1925: We have this situation:

54 1. Immediately upon the going into effect of the Treaty of 1925 all possibility of unifying shore ownership, except by the United States in the exercise of eminent domain, was foreclosed.

2. But subsequent to 1898 and up to the signing of the Treaty of 1925, the Acts of 1898 were certainly in full force and effect and expressly gave the United States the sole right to overflow the shore lands in aid of navigation. In the fact of this existing right no other agency could have acquired a flowage right for any purpose from 1898 to the date of the Treaty; after which it was still true that no agency except the United States could acquire a flowage right.

The offer of testimony by the respondents is objected to further on the ground that the union of properties necessary for the project is so impracticable that the possibility of such union could not affect the market value or price.

The Government objects to all testimony relative to the acquisition of shore lands because of their supposed value for storage purposes. The ground of this objection is that it matters not whether one or ten or twelve of these good people, or one hundred, or all of them were deceived into the belief that they could acquire lands on the shore of Lake of the Woods and thereby hope for some enhancement in their value on account of reservoir purposes—it matters not at all if all of them were deceived in that belief if as a matter of

law that could not have taken place, and unification could not have been completed, and there was no buyer in the market who could ever have undertaken to acquire those lands.

55 Mr. Harries: 1. The Government objects to the admission of this testimony (1) upon the ground that no foundation has been laid for proof of the foregoing facts by this or any other witness; (2) upon the ground that the witness has not been qualified to testify to the foregoing facts; (3) upon all the grounds stated at the opening of court January 27, 1931, beginning at page 233 of the record.

The Court: The objection is sustained.

Mr. Lewis: Exception.

26.

Mr. Lewis: 2. Respondents further offer to prove by said witness that it is practicable to develop a total of about 325,000 electrical horse power on a 24 hour basis at the said site with the regulated outflow from Lake of the Woods.

Mr. Harries: 2. The Government objects upon all the grounds stated at the opening of court January 27, 1931, beginning at page 233 of the record; and upon the ground that it is immaterial what power could be developed with regulated outflow from the Lake of the Woods unless competent proof is first made of the practicability of using such power, by first establishing (a) the market; (b) the cost of marketing; (c) the cost of developing a market; (d) the cost of producing and (e) that there exists no source of cheaper power.

The Court: The objection is sustained.

Mr. Lewis: Exception.

27.

Mr. Lewis: 3. Respondents further offer to prove by said witness that he knows the conditions in the regions in which it is practicable to distribute the electrical power generated at said power sites with respect to the existing demand and market and the possible further demand and market for such power. That during 1929 and 1930 there was a demand and market for the entire output of all power
56 plants then in operation, and because of difficulty in supplying such demand the power interests were asking that power users economize in the amount of power consumed. That recently another power unit has been completed so that there is at present some surplus of power. That

in his opinion, however, such surplus will all be taken up within a period of from three to five years, and that there will be a demand and market for all the power which can be developed at said sites within a comparatively short time.

Mr. Harries: 3. To this the Government objects that the same is purely speculative and conjectural, without adequate foundation; and wanting in proof of what power can now be developed from said sites.

The Court: The objection is sustained.

Mr. Lewis: Exception.

28.

Mr. Lewis: 4-a. Respondents further offer to prove by said witness that during the course of his investigations as consulting engineer for the International Joint Commission he calculated what would have been the average dependable outflow of water from the Lake of the Woods at its outlets under natural conditions. That said average dependable outflow under natural conditions would have been from 6500 to 7000 cubic feet per second.

4-b. Respondents further offer to prove by said witness that he has determined what the average dependable outflow is and will be from the Lake of the Woods with the lake utilized as a storage reservoir and the waters controlled as contemplated by the treaty. Said average dependable outflow is and will be a little more than 10,000 cubic feet per second, making an increase of 3,000 or 3,500 cubic feet per second over the average dependable outflow under natural condition.

57 4-c. Respondents further offer to prove by said witness that the continuous power that could be developed at the outlets of the lake, with the lake utilized as a storage reservoir and the waters controlled as contemplated by the treaty, would be increased, as compared with natural conditions, in the same relative proportion as the average dependable outflow, that is, about 50%.

Mr. Harries: 4-a-b-c. The Government objects to the admission of the testimony comprised in the three paragraphs last above written upon the ground that no proper foundation has been laid; there is no proof that the average dependable outflow under treaty control can be utilized at existing or future power sites; and upon the grounds stated beginning at page 233 of the record.

The Court: The objection is sustained.

Mr. Lewis: Exception.

29.

Mr. Lewis: 5. Respondents further offer to prove by said witness that from his connection and experience with hydroelectric projects in general, and especially those at the outlets of the Lake of the Woods and in the Winnipeg River, and from his acquaintance with the value of the Lake of the Woods storage reservoir and the hydroelectric projects at the outlets of the Lake of the Woods and in the Winnipeg River, and from his acquaintance with the demands for power in the territory available to the interests or authorities operating or controlling said projects, he has formed an opinion as to whether such interests or authorities would seek to acquire the flowage rights and easements contemplated by the treaty of 1925 if said treaty had not been entered into and if said easements were not being acquired by the United States. That in his opinion said interests or authorities would seek to acquire such flowage rights and easements.

58 Mr. Harries: 5. The Government objects to the admission of the foregoing proffered testimony on the grounds (1) that it is speculative, conjectural and without any foundation; (2) that it is immaterial what any given interest would "seek" unless final validity in relation to power interests is established for the doctrine "seek and Ye shall find"; and upon the grounds stated by the Government beginning at page 233 of the record.

The Court: The objection is sustained.

Mr. Lewis: Exception.

30.

Mr. Lewis: 6. Respondents further offer to prove by said witness that the reasons for his opinion stated in the last preceding offer of proof are as follows: That it is impossible to utilize the storage possibilities of the Lake of the Woods reservoir without flooding the shore lands in the State of Minnesota. That the value of the Lake of the Woods as a storage reservoir in the development of continuous power is so great that considerations of economy and good business, as well as the desire on the part of interests or authorities owning or controlling the power projects to be secure in the use and enjoyment of said reservoir, would require the acquisition by them of the flowage and storage rights and easements on the shore lands in Minnesota.

Mr. Harries: 6. The Government objects to the admission of the foregoing testimony on the ground that it is too indefinite to be a proper subject of legal proof; is specula-

tive and conjectural, without proper foundation; and further objects on all grounds stated by the Government beginning at page 233 of the record; and the testimony that it is impossible to utilize the storage possibilities of the Lake of the Woods reservoir without flooding the shore lands in
59 Minnesota is objected to as a false statement of what the witness would testify, and said witness Adolph F. Meyer established the falsity of said offer in an affidavit made part of this record in connection with this offer of proof.

The Court: The objection is sustained.

Mr. Lewis: Exception.

31.

Mr. Lewis: 7. Respondents further offer to prove by said witness that from his experience and contacts with the acquisition and development of reservoir and power projects, he knows that there is an established custom and practice which is usually followed in arriving at the fair market value of flowage and storage rights and easements where the same are sought to be acquired through negotiation and purchased, and that he knows what such custom and practice is.

Mr. Harries: 7. Proof of the custom and practice usually followed is objected to as immaterial to the issues of this case where the same were not followed and as a matter of law could not be carried out.

The Court: The objection is sustained.

Mr. Lewis: Exception.

32.

Mr. Lewis: 8. Respondents further offer to prove by said witness that such custom and practice is as follows: That negotiations are carried on between the owner of the flowage rights and easements and the party desiring to acquire the same. That the owner is usually willing to sell but is not required to do so. The party desiring to acquire the easement is usually willing to buy but is not compelled to do so. Each party will exercise the best judgment that he possesses, based upon information he has, with the result that the parties will usually agree on a price which will be somewhere between the use value of the flowage right and easement to the purchaser and the use value of the
60 land to the landowner, which price will not be based on the needs of the purchaser or the profits which he will derive from the project nor on the value of the land to the owner but will represent a fair market value reached through negotiation and bargaining in the manner stated.

Mr. Harries: 8. The Government objects to the admission of the proposed testimony upon the grounds of objection last above stated; upon the ground that in this proceeding neither the use value of flowage rights nor use value of owners' lands is the true measure of damage; on the ground that the proposed testimony states a legal conclusion as to what constitutes fair market value.

The Court: The objection is sustained.

Mr. Lewis: Exception.

33.

Mr. Lewis: 9. Respondents further offer to prove by said witness that from his knowledge and experience he has an opinion as to whether the fair market value of the flowage easements contemplated by the treaty of 1925 would have been arrived at and the title to said easements acquired by the interests or authorities operating or controlling the power projects through negotiation and purchase, if the treaty had not been entered into and if the United States had not undertaken thereby to acquire such easements. That in his opinion the fair market value of said easements would have been arrived at and said easements acquired in the manner described in the last preceding offer of proof.

Mr. Harries: 9. The Government objects to the reception of the proposed proof upon the ground that it is not based upon the true measure of fair market value; that it assumes facts that are purely conjectural; and upon the ground that on the date of the Commissioners' awards in this proceeding and for four years prior thereto the treaty of 1925 precluded acquisition of easements by anyone other than the
61 present condemnor.

The Court: The objection is sustained.

34.

Mr. Lewis: 10. Respondents further offer to prove by said witness that in his opinion the title to said easements could and would have been acquired by the interests or authorities operating or controlling the power projects in accordance with the custom and practice described in the foregoing offers of proof. That the acquisitions of said easements by said interests or authorities could and would have been accomplished through the medium of a subsidiary American corporation or other American agency acting on behalf of or co-operating with the Canadian interests or authorities.

Mr. Harries: 10. The Government objects to the admission of the proposed proof upon the ground that it is speculative and conjectural; upon the ground that it contains conclusions of law; and upon all grounds stated by the Government beginning at page 233 of the record (which the reporter is asked to copy here in full):

"II. The objection on the part of the United States to the admission of such evidence is made upon the following grounds:

1. That such evidence is incompetent, irrelevant and immaterial.

2. That such testimony is highly speculative and conjectural for the following reasons:

(a) It erroneously assumes as an existing fact fixed costs of plant site, operation, personnel, taxes and finances without basis other than conjecture and speculation.

(b) It assumes as a fact the full development of the power which such a reservoir is capable of producing and also erroneously assumes a market for the said power so as-
62 sumed to be developed as a result of the assumed use of said basin and respondents' land as a part thereof.

(c) It assumes the earning of large profits from the use of the power so assumed to be developed and used.

(d) It assumes the practicability of united in one ownership approximately 1573 separate parcels of land without the exercise of eminent domain.

(e) It erroneously assumes the full development of all the power of which said reservoir is capable and also the constant employment of the same on an earnings basis and fixed profit.

(f) It excludes the use of said power which said body is capable of producing under full development for municipal or other public purposes on a cost basis or small margin of profit.

3. That no sufficient foundation has been laid for the introduction of said testimony.

4. That such testimony does not go to the true measure of damages in this case; namely, the difference in market value of the property affected by the easement before and after such easement is imposed.

5. That such testimony presupposes and assumes as status of the titles to the said lands at variance with the status thereof at the time of the condemnation; that is to say, at the date of the filing of the awards of the Commissioners.

6. That respondents have not sustained the burden of first proving the practicability of unifying shore ownerships, as required by law.

III. The Government further objects to any such evidence upon the further grounds:

63 1. The multiplicity of titles to lands affected by the petitions of the Government for condemnation pursuant to the treaty between the United States and Canada makes it utterly impracticable as a matter of law to unite them for reservoir purposes, except through the intervention of the power of eminent domain.

(a) The physical magnitude of the project embracing 78,081 acres of land distributed along a shore line of over 1500 miles of mainland shoreline the ownership of which is reposed in approximately 850 recorded fee owners of lands in the United States of whom many have died, leaving unknown heirs, or have disappeared to parts unknown, and approximately 723 private owners in the Province of Ontario, render the exercise of the power of eminent domain the sole practicable means of so regulating or lawfully affecting the levels of the lake.

2. Similarly the multiplicity of titles to the land affected in this proceeding, pursuant to the said treaty between the United States and Canada, makes it utterly impracticable as a matter of fact to unite them for reservoir purposes save by eminent domain.

3. The ownership by the United States of a vast acreage ranging from approximately 50,000 acres when the lands in question were first opened for entry to 11,000 acres of land at the time the present proceedings were instituted rendered it impossible for any private interest to acquire and exercise a lawful right to flood the margins of the lake or otherwise control its levels.

64 (a) The homestead law, (43 U. S. C. A. Sec. 162) provides that lands in the public domain must be taken for the purpose of actual settlement and not for speculation.

(b) The Act of Congress of January 14, 1889, entitled "An act for the relief and civilization of Chippewa Indians

in the State of Minnesota", (25 statutes at large 644) provides that the agricultural lands acquired under the act "shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law."

4. That the ownership of a large part of the lands necessary for such reservoir and owned by the Province of Ontario, the policy of which province is opposed to the acquisition of any exclusive right of control of power sites and said lake levels, render it extremely unlikely, if not wholly impossible to acquire flowage rights on the Canadian shore.

5. That the shore lands bordering on the Lake of the Woods have been continuously subject to four separate governmental jurisdictions until July 15, 1930, and since that date subject to five governmental jurisdictions, each charged with the duty of protecting its own interests therein, and to preserve and perform its own administrative policies, making it wholly impracticable for private interests to acquire flowage rights thereon.

6. That the Lake of the Woods is international and navigable boundary water, the right to regulate and control which reposes solely in the United States and the Dominion of Canada.

7. That under the law of the Dominion of Canada the Lake of the Woods, at least to the extent thereof within the boundary of the Dominion of Canada, is wholly subject to the jurisdiction of the Dominion Government for the protection of navigation thereof.

8. The structures on the Lake of the Woods outlets controlling the regulation of the lake have been under governmental control from 1898 to the present time for the protection of navigation and this physical control of such outlets by a governmental agency in the interest of one of its prime functions, precludes the possibility of control of the lake levels by any other agency or interests.

9. The Lake of the Woods has been subject to international commitment, regulation and control since the treaty of 1909 with Great Britain, which established the order of precedence of the various interests, with power in fourth place.

10. All Crown lands in the Province of Manitoba and Ontario were withdrawn in 1915 and 1920 from any disposition inconsistent with governmental control and regulations.

11. The Indian Act of the Dominion of Canada, requiring a majority consent from each band located on Indian reser-

vations adjacent to said lake, of which there are forty in number, renders it wholly impracticable and unfeasible to contemplate successful negotiations with said Indian occupants leading to their consent to relinquishment in their reservations.

12. The interests on the part of those concerned in the level of the Lake of the Woods are varied and embrace
66 navigation, fishing, lumbering, domestic and sanitary purposes and power and these interests require radically different stages and conditions of the levels of said lake, and because they are so radically different one from another they preclude the reasonable expectation that the same could be reconciled by any persons or concern other than governmental authority.

13. Respondents' testimony on reservoir value is inadmissible until proof is made of a reasonable possibility of uniting in one person or firm.

(a) Power to unify shore ownership.

(b) Right to control the levels of the lake.

(c) Physical control of the outlets of the lake, each of which it is absolutely impracticable to so much as contemplate except by the joint action of the National Sovereignties having jurisdiction of the Lake of the Woods.

14. That it is impracticable as a matter of law for any power interest to unify ownership on the margin of said Lake because of the law of the State of Minnesota (Sections 8076 and 8077, Mason's Minn. Stat. 1927) forbidding foreign interests to acquire more than 90,000 square feet of land in Minnesota.

IV. Such testimony by respondents is further objected to on the ground that it conclusively appears that the regulation of the levels of said lake can be maintained or controlled only by governmental agency and by the exercise and power of eminent domain. In connection with this ground of objection in addition to other matters before the court, there is called to the attention of the court:

1. Section 10437, Mason's Minn. Stat. 1927, providing that to drain or attempt to drain in any manner any lake or body of water meandered by the United States is a gross misdemeanor, and also,

67 2. Article 2, Section 2 of the Constitution of Minnesota and the enabling Act of [1957], page XII, Mason's

Minn. Stat. 1927, to the effect that water forming boundaries with other states shall be common highways and forever free.

Further in this same connection, attention is called to the Acts of Congress approved June 7 and July 1, respectively, 1898 (30 Stat. 67, 571, 576) expressly reserving to the United States the right to flow the lands involved herein without any liability therefor to any person so acquiring said land thereafter.

Objection is further made to the introduction of such evidence for the reason that even if it be assumed that the said Acts June 7 and July 1, 1898, respectively, are impliedly repealed by the Treaty of 1925: We have this situation:

1. Immediately upon the going into effect of the Treaty of 1925 all possibility of unifying shore ownership, except by the United States in the exercise of eminent domain, was foreclosed.

2. But subsequent to 1898 and up to the signing of the Treaty of 1925, the Acts of 1898 were certainly in ful' force and effect and expressly gave the United States the sole right to overflow the shore lands in aid of navigation. In the face of this existing right no other agency could have acquired a flowage right for any purpose from 1898 to the date of the Treaty; after which it was still true that no agency except the United States could acquire a flowage right.

The offer of testimony by the respondents is objected to further on the ground that the union of properties necessary
for the project is so impracticable that the possibility
68 of such union could not affect the market value or price.

The Government objects to all testimony relative to the acquisition of shore lands because of their supposed value for storage purposes. The ground of this objection is that it matters not whether one or ten or twelve of these good people, or one hundred, or all of them were deceived into the belief that they could acquire lands on the shore of Lake of the Woods and thereby hope for some enhancement in their value on account of reservoir purposes,—it matters not if all of them were deceived in that belief if as a matter of law that could not have taken place, and unification could not have been completed, and there was no buyer in the market who could ever have undertaken to acquire those lands."

The Court: The objection is sustained.

Mr. Lewis: Exception.

35.

Mr. Lewis: Respondents further offer to prove by said witness Adolph F. Meyer, that for a number of years before 1925, he was consulting engineer for the Keewatin Power Company and that he has been consulting engineer for said company from 1925 to the present time; that he is acquainted with the facts and circumstances leading up to and continuing through the negotiation and execution of the contract entered into between said Keewatin Power Company and the Government of the Dominion of Canada, and that he knows the desires and requirements of the interests and authorities operating and controlling the dams and projects at the outlets of said lake, regarding the use and control of said Lake of the Woods Reservoir, as such desires and requirements conflicted with the desires and requirements of the interests and authorities operating and controlling the projects in the Winnipeg River.

36.

69 Mr. Lewis: Respondents further offer to prove by said witness Adolph F. Meyer, that the interests and authorities operating and controlling the same and projects at the outlets of said lake, within the province of Ontario, at all times favored and required and now favor and require a different outflow and type of storage and control of the waters of said lake from those favored and required by the interests and authorities operating and controlling the projects in the Winnipeg River, within the Province of Manitoba.

37.

Mr. Lewis: Respondents further offer to prove by said witness that the difference between the outflow, and the type of storage and control favored and required by said Ontario interests and authorities, and those favored and required by said Manitoba interests and authorities, was substantial and fundamental, and was such as caused and would cause said Ontario interests and authorities to compete with said Manitoba interests and authorities for the right and power to develop and control said Lake of the Woods Storage Reservoir.

Mr. Harries: The Government objects to the foregoing testimony upon the following grounds: (1) It is too general and indefinite to be received in evidence; (2) The probabilities of competition are not a proper subject of expert testi-

mony by this witness; (3) The testimony is speculative; (4) no foundation has been laid for its introduction; (5) it is further objected to as immaterial; (6) The Government objects to testimony of a difference in interest between Ontario and Manitoba authorities as to outflow control, upon the ground that these differences would not put such authorities in competition for flowage rights; and objects to testimony of competition for the right to develop and control Lake of the Woods reservoir on these grounds; (a) competition for the right to develop the reservoir would not put said au-
70 thorities in competition for the lands on the American shore, but would go only to the Canadian governmental privilege of controlling the outlets; (b) there is no showing that such competition was reflected in market values on the south shore; (c) as a matter of law, such competition could not be reflected in market values on the south shore because of the impracticability of developing and controlling the reservoir without the intervention of eminent domain.

38.

Mr. Lewis: Respondents further offer to prove by the witness Adolph F. Meyer that prior to the signing of the treaty of 1925 and the negotiations leading up to said treaty the power capacities at the outlets of the Lake of the Woods and in the Winnipeg River deriving substantial benefits from the Lake of the Woods storage reservoir had already been developed to such an extent that the interests or authorities operating or controlling said power developments would, for the reasons stated in preceding offers of proof, have sought to acquire the flowage easements required for the Lake of the Woods reservoir if the treaty had not been entered into.

Mr. Harries: The Government objects to this testimony as a conclusion, without proper foundation, incompetent, irrelevant and immaterial.

The Government also objects to all of the proposed testimony of Adolph F. Meyer, and to each item thereof, upon each of the grounds stated on pages 613 to 620 A inclusive of the record immediately after the offer to prove previously made by means of the witness Adolph F. Meyer.

39.

"Respondents further offer to prove, by said witness Adolph F. Meyer, that for a number of years before 1925 he was consulting engineer for the Keewatin Power Company and that he had been consulting engineer for said company

from 1925 to the present time; that he is acquainted with the facts and circumstances leading up to and continuing through the negotiation and execution of the contract entered
71 into between said Keewatin Power Company and the Government of the Dominion of Canada, and that he knows the desires and requirements of the interests and authorities operating and controlling the dams and projects at the outlets of said Lake, regarding the use and control of said Lake of the Woods reservoir, as such desires and requirements conflicted with the desires and requirements of the interests and authorities operating and controlling the projects in the Winnipeg River.

"Respondents further offer to prove by said witness, Adolph F. Meyer, that the interest and authorities operating and controlling the dams and projects at the outlets of said lake, within the province of Ontario, at all times favored and required and now favor and require a different outflow and type of storage and control of the waters of said lake from those favored and required by the interests and authorities operating and controlling the projects in the Winnipeg River, within the province of Manitoba.

41.

"Respondents further offer to prove by said witness that the difference between the outflow and the type of storage and control favored and required by said Ontario interests and authorities, and those favored and required by said Manitoba interests and authorities, was substantial and fundamental, and was such as caused and would cause said Ontario interests and authorities to compete with said Manitoba interests and authorities for the right and power to develop and control said Lake of the Woods Storage Reservoir.

"The Government objects to the foregoing testimony upon the following grounds: (1) That it is too general and indefinite; (2) That probabilities of competition are not a proper subject of expert testimony by this witness; (3) the testimony is speculative; (4) no foundation has been laid for its introduction; (5) it is further objected to as immaterial; (6) The Government objects to testimony of a difference in interest between Ontario and Manitoba authorities as
72 to outflow control, upon the ground that these differences would not put such authorities in competition for the right to develop and control the Lake of the Woods reservoir on these grounds; (a) competition for the right to develop the reservoir would not put said authorities in com-

petition for the lands on the American shore, but would go only to the Canadian governmental privilege of controlling the outlets; (b) there is no showing that such competition was reflected in market values on the south shore; (c) As a matter of law such competition could not be reflected in market values on the south shore because of the impracticability of developing and controlling the reservoir without the intervention of eminent domain.

"Respondents further offer to prove by the witness Adolph F. Meyer that prior to the signing of the treaty of 1925 and the negotiations leading up to said treaty the power capacities at the outlets of the Lake of the Woods and in the Winnipeg River deriving substantial benefits from the Lake of the Woods storage reservoir had already been developed to such an extent that the interests or authorities operating or controlling said power developments would, for the reasons stated in preceding offers of proof, have sought to acquire the flowage easements required for the Lake of the Woods reservoir if the treaty had not been entered into.

"The Government objects to this testimony as a conclusion, without proper foundation, incompetent, irrelevant and immaterial.

"The Government also objects to all of the proposed testimony of Adolph F. Meyer, and to each item thereof, upon each of the grounds stated immediately after the offer to prove previously made by means of the witness Adolph F. Meyer."

73 Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 35.

(Document marked Respondents' Exhibit 35 for identification by the reporter.)

42.

Mr. Lewis: The respondents now offer to prove by the witness Clarence H. Nelson, the facts set forth in Respondents' Exhibit 35. And respondents also say that if the witness Clarence H. Nelson were permitted to testify, that he would testify as the facts are set forth in Respondents' Exhibit 35, Mr. Clarence H. Nelson being engineer for the Minnesota Tax Commission.

"Clarence H. Nelson.

II. Respondents offer to prove by the witness Clarence H. Nelson that he is a resident of the City of Minneapolis. That he was graduated from the University of Minnesota in

1925 with the degree of electrical engineer. That since his graduation he has been employed for a year and a half with the Public Service Company of Northern Illinois, with offices at Chicago, and that since February, 1927, he has been electrical hydraulic engineer for the Minnesota State Tax Commission.

43.

12. Respondents further offer to prove by said witness that he is acquainted with the custom and practice in the State of Minnesota in the taxation of flowage rights and easements.

13. Respondents further offer to prove by said witness that for a number of years last past the State of Minnesota and the various taxing authorities of said state and of the political subdivisions thereof in which waterpower of storage projects are located have taxed flowage rights and easements as separate and distinct property.

Mr. Harries: The Government objects to the offer on the grounds stated in the statement of objections attached
74 to the copy of the proposed testimony of Mr. Nelson, and I ask to have it marked as Government's Exhibit 99.

(Document marked Government's Exhibit 99 for identification by the reporter.)

13. The Government objects upon all of the grounds stated at the opening of court January 26, 1931 (record page 233); and upon the further grounds (1) that the mode of assessing taxes or determining elements of value for purposes of taxation is incompetent, irrelevant and immaterial; (2) that the proposed testimony contains conclusions of law for proof of which by this witness no proper foundation has been laid.

The Government also objects to all of the proposed testimony of Clarence H. Nelson and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer."

The Court: The objection is sustained.

Mr. Lewis: Exception.

75 Mr. Lewis: 14. "Respondents offer to prove by the witness W. E. King, duly sworn and on the stand ready to testify, that he is a graduate of the University of

Minnesota, 1905, with the degree of Civil Engineering; that he is a member of the American Society of Civil Engineers, the American Concrete Institute, the St. Paul Society of Engineers, and is a registered engineer licensed to practice said profession in the State of Minnesota. That said witness has been actively engaged in the engineering profession since the year 1905; that for two years he was employed by the American Bridge Company of Minneapolis, Minnesota, as an Engineer; for one year he served as engineer for the Minneapolis Steel & Machinery Company, and for one year as engineer in the Bridge Department of the Great Northern Railway Company; That during all other times since the year 1905 he has been and is now a practicing and consulting engineer. That said witness has had a wide and varied experience in power projects involving the purchasing and valuing of flowage easements; that among such projects to which he has given study and with which he has been actively engaged are the following: The construction of two dams in the Des Moines River near Humboldt, Iowa, where his duties consisted in the erection of such dams and in the valuing of the flowage easements purchased for reservoir purposes on such projects; that he supervised the construction of the dams at Rutland, Iowa, where his duties were similar to those described on the said project at Humboldt, Iowa; that he was called in as consulting engineer to assist in determining the value of flowage and stor-
76 age easements acquired by the Northern States Power Company on its project in the Mississippi River near St. Paul. That he has been consulted on numerous occasions with respect to valuing flowage and storage easement for the purpose of rate-making; that he was recently engaged in behalf of Morrison County, Minnesota, in the valuation of flowage and storage easements on the so-called Blanchard Dam Project and Little Falls Dam project, which valuations were made to determine the value of said flowage and storage easement for the purpose of taxation."

Mr. Harries: 14. The Government objects to any statement of qualifications to determine the valuation of flowage rights for the purposes of taxation as being immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

45.

Mr. Lewis: 15. Respondents further offer to prove by said witness that he knows that there is a custom and practice in the State of Minnesota and in other northwestern

states with reference to the purchase and conveyance of flowage easements. That it is the custom and practice in the State of Minnesota and other northwestern states to purchase, sell, and transfer flowage easements as separate and distinct units of property, and that for many years flowage easements have been regarded and dealt in in the State of Minnesota as such separate units of private property. That flowage easements are commonly recorded in the offices of the Register of Deeds of the several counties of Minnesota in like manner as other deeds of conveyance.

Mr. Harries: 15. The Government objects to this testimony of the witness as a conclusion of law, and without proper foundation; upon the ground that the custom and practice stated is not a proper measure of damage in this proceeding; on the ground that custom and practice is immaterial; and on the ground that the custom and practice proved must be the custom and practice at the time when and the place where the condemnation is exercised.

77

The Court: The objection is sustained.

Mr. Lewis: Exception.

46.

Mr. Lewis: 16. Respondents further offer to prove by said witness that he has been personally connected with the evaluation and assessment of flowage easements in the State of Minnesota, and that he has made a study of the practice of the taxing authorities in said state in assessing and taxing flowage easements. That he knows of his own knowledge that flowage easements are assessed and taxed as separate and distinct units of private property by the taxing authorities of various places in said state.

Mr. Harries: 16. To which the Government objects on the ground that the practice of taxing authorities is irrelevant and immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

47.

Mr. Lewis: 17. Respondents further offer to prove by said witness that there is a well established and generally recognized custom and practice among hydraulic engineers and owners and operators of projects involving flowage easements and reservoir, and among those charged with the responsibility of appraising the value of flowage easements.

That he knows what this custom and practice is. That this custom and practice is that the value of each storage reservoir and of the flowage easements required therefor is appraised and determined on the special facts and circumstances in connection therewith.

Mr. Harries: 17. To which the Government objects on the ground of objection to number 15.

78 The Court: The objection is sustained.

Mr. Lewis: Exception.

48.

Mr. Lewis: 18. Respondents further offer to prove by said witness that there is no market for flowage easements in the State of Minnesota and other northwestern states as the term "market" is commonly understood. That there is no market value in said region for flowage easements as the term "market value" is commonly understood. That from the nature of the projects for which flowage easements are required it is impossible for a market therefor to exist, because the value of each such project and of the flowage easements required therefor must be determined according to the special facts and conditions thereof.

Mr. Harries: 18. To which the Government objects on the ground that special facts and conditions are not the true measure of damage; and on the ground that the testimony of what constitutes a market or market value is a conclusion of law; as incompetent, irrelevant and immaterial, and without proper foundation; and upon each ground heretofore stated.

The Court: The objection is sustained.

Mr. Lewis: Exception.

49.

Mr. Lewis: 19. Respondents further offer to prove by said witness that the method uniformly used in appraising and determining the value of any easement for flowage or storage purposes according to the well established custom and practice which has been described by the witness and with which the witness is acquainted is to take into consideration the storage capacity of the reservoir in question, the location of the reservoir with reference to the place of utilization of the water stored therein, the extent to which and the manner in which the water can be utilized, the time which will be required therefor, and the economic practicability of the

development and operation of the necessary project
79 work. The determination of the value of the reservoir as a whole and of each component part thereof, including the value of the several flowage easements required, then becomes a matter of expert intelligence and professional judgment, based upon experience.

Mr. Harries: 19. To which the Government objects upon each ground heretofore stated and upon the further ground that the witness leaves out of account the vital consideration of the practicability of uniting ownership of the properties necessary for the project and deals only with the economic practicability of the development. The Government also objects to all of the proposed testimony of W. E. King and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 43.

(Document marked Respondents' Exhibit 43 for identification by the reporter.)

Mr. Lewis: Respondents offer to prove by the witness Gardner S. Williams, the facts set forth as evidence in Respondents' Exhibit 43, and will state to the Court that if the witness Gardner S. Williams were permitted to testify that he would testify to the facts as set forth in said Exhibit 43.

Mr. Harries: The Government objects to the testimony of Gardner S. Williams on the grounds as stated in the sheets attached to the copy of the offered testimony of Mr. Williams, and I ask to have the document marked as Government's Exhibit 101.

(Document marked Government's Exhibit 101 for identification by the reporter.)

80 50.

Mr. Lewis: 20. Respondents offer to prove by the witness Gardner S. Williams as follows:

That he resides in Ann Arbor, Michigan, and is 64 years of age. That his present occupation is consulting engineer.

That he has had 43 years engineering experience. That he is a member of the following engineering societies:

Member American Society of Civil Engineers

" " " " Mechanical Engineers

" The Detroit Engineering Society, and others, and has been a Vice President of American Engineering Council for the past 7 years.

That he was educated in the public schools of Saginaw, Michigan, and at the University of Michigan, where he was graduated with degree of Bachelor of Science in Civil Engineering in 1889, and received advance degree of Civil Engineering in 1899. That he began work on local land surveys while in [collect] and in the summer of 1887 was engaged on water works construction at Bismarck, North Dakota, and similiarly in 1888 and 1889 at Greenville and Owosso, Michigan, respectively. That from 1889 to 1893 he worked for the Russel Wheel & Foundry Company of Detroit, a firm of manufacturing contractors in iron and steel; as draftsman and engineer, and from 1893 to 1898 was civil engineer to the Board of Water Commissioners of Detroit. That from 1898 to 1904, he was Professor of Experimental Hydraulics and Engineer in Charge of the Hydraulic Laboratory at Cornell University; and from 1904 to 1911 was Professor of Civil, Hydraulic and Sanitary Engineering at the University of Michigan, also carrying on a consulting practice from 1898. That he was appointed a member of the International Waterways Commission by President Roosevelt in 1903 and resigned therefrom in 1905. That since leaving the University of Michigan in 1911 he has been engaged in consulting work, mainly
81 along water power and water supply and other hydraulic lines; and has been called to practice in 21 states as well as the Canadian Provinces of Quebec and Ontario, the major part of his work being in Michigan, Illinois and Minnesota, in each of which he is registered to practice engineering. That among his important works in Michigan have been the design and construction of hydroelectric power plants for the Edison Sault Electric Company in the Rapids at Sault Ste. Marie, Michigan, with which he was connected from 1905 to 1916; the design and construction of a series of five hydroelectric power plants with local storage on the Huron River in Michigan for the Detroit Edison Company, between 1906 and 1926. Also the design and construction of hydroelectric plants for the City of Sturgis, Michigan, on the

St. Joseph River and for the Alpena Power Company on the Thunder Bay River in Michigan. That in Iowa he designed and supervised the construction of a dam across the Des Moines River at Des Moines, Iowa, for power and storage purposes. That in Illinois, his engagements have been mainly in connection with the constructions, hydraulic investigations and litigations of the Sanitary District of Chicago, including studies of the regulation of the international waters of the Great Lakes System. That in Minnesota in 1911-12 he was employed by the Corps of Engineers of the United States Army to design the substructure of the Power House at Lock and Dam No. 1 of the Mississippi River Improvement, which is located between Minneapolis and St. Paul, and which was constructed after the plans prepared by him, and in 1913 he was engaged as consulting engineer to design and supervise the construction of various storage dams for the Great Northern Power Company of Duluth, and continued in that relation until the property of the Company was sold in 1923,
during which time there were constructed the Island
82 Lake Storage Dam, the Boulder Lake Storage Dam
and the Whiteface Reservoir Dam, and extensive studies were made of possible equalization of the flow of the St. Louis River. That from 1916 to 1918 he was engaged in the reconstruction of the hydraulic power plants of the Watab Pulp & Paper Company, at Sartell, Minnesota, and in the water power and storage investigations in connection with that property. That he has been a witness in various litigations among which are:

The Drainage Canal Case, State of Missouri vs. State of Illinois, etc., in the U. S. Supreme Court. The Sanitary District Cases; U. S. vs. Sanitary District of Chicago, in the U. S. District Court for Northern Illinois.

The Chandler-Dunbar Water Power Case in the U. S. District Court for Western Michigan; Milwaukee vs. Western Foundation Co., in the U. S. District Court for Eastern Wisconsin; Wm. Cramp & Sons vs. Wellman-Seaver Morgan Co., in the U. S. District Court for Northern Ohio; Neely vs. Ford Motor Co., in the U. S. District Court for Eastern Wisconsin; Wisconsin et al. vs. Illinois & Sanitary District, before the U. S. Supreme Court, with Justice Charles Evan Hughes as Master.

That he has also been a witness in the state courts of Michigan, Illinois, Minnesota, Iowa, New York, Wisconsin and Virginia. That in cases involving valuations he was the

principal witness for the company in City of Ithaca vs. Ithaca Water Works Company for condemnation in New York. That he was a leading witness for the defendants in U. S. vs. Chandler Dunbar Water Power Company, et al. That he was also a witness in Loranger vs. City of Flint, a water diversion and drainage case in Michigan, and in City of Chicago vs. Sanitary District of Chicago, a sewer right of way
83 condemnation case in Illinois. Also in Marselles Water Power Co. vs. Northern Illinois Traction Co., a. water power valuation case in Illinois, and in Landowners vs. Watab Pulp and Paper Co., a flood damage case in Minnesota. Also in City of Pontiac vs. Commercial Milling Co., a water power condemnation case in Michigan; in Bryant Paper Co. vs. Monarch Paper Co., a flood damage case in Michigan; in Rayburn Lumber Co. vs. Alpena Power Company, a flood damage case in Michigan; and in Hubbell vs. Van Tine et al., a water storage and damage case in Michigan. That he was also the leading witness for the defendant in Warner Moore & Co. vs. Chesapeake and Ohio Ry. Co., a water supply damage case in Virginia, and has made several appraisals of property for sale or bonding purposes; That among the latter, for several years he made appraisals of the additions and betterments of the properties of the Great Northern Power Co. of Duluth, for bonding purposes, in which the betterments. etc. consisted of water power and storage lands and constructions, transmission lines and appurtenances, rights of way, power plants, etc. During the World War he was an Associate Member of the Naval Consulting Board and engaged on the survey for Industrial Preparedness of Michigan, in 1916, and was a Major in the Engineer Officers Reserve Corps, stationed at Camp Beauregard, La., on camp construction, and at Washington, in the constructing quartermaster's department, in 1917. That in the acquisition of lands for water power or reservoir purposes, in association with three other gentlemen, he acquired control of some 12,000 or 14,000 acres of water power lands in Michigan on the Tittabwassee and Tobacco Rivers comprising sites for five dams and power plants, making a reservoir development of the stream covering some 90 miles of river and trib-
84 utaries designed to equalize about 75 per cent of the flow of the stream, which involved the acquisition of about 400 parcels without the exercise of powers of eminent domain or any governmental assistance, there being no water power condemnation in Michigan at that time, which was between 1907 and 1917. That the property so acquired has been

since developed. That between 1906 and 1920 he had charge of the expenditure of nearly a million dollars for water power lands and rights on the Huron River in State of Michigan for the Detroit Edison Company, the prices paid for the latter lands and rights ranging from $16.00 to $400.00 per acre. Those properties were to a large extent secured for reservoir purposes as each plant was developed with as much storage above it as it was possible to get, and they consisted in part of flowage easement and in part of fee acquisitions.

51.

Mr. Lewis: 21. Respondents further offer to prove by the witness Gardner S. Williams that he has studied and acquainted himself with the report known as Water Resources Statement No. 3 of the Dominion Water Power Branch, Department of the Interior of Canada, published in 1915, entitled "Winnipeg River Power and Storage Investigation," by J. T. Johnson, also with the documents known as Water Power Resources Paper of the Department of the Interior of Canada, Dominion Water Power and Reclamation Surveys, Nos. 31, 54 and 57, as well as with a very large amount of other literature and engineering and statistical data and information relating to the power resources and developments of the Lake of the Woods and Winnipeg River. That he has personally visited and examined the Lake of the Woods and the Winnipeg River Power Projects, and that he knows the power capacities of the Lake of the Woods and the Winnipeg River and the extent of the development of such capacities up to the present time. That he has visited the City of Winnipeg and the villages of Kenora and Rainy
85 River and intervening points in Canada, and the villages of Warroad, Baudette, and intervening points in the State of Minnesota. That he is familiar with the character of the lands involved in these condemnation proceedings.

Mr. Harries: 21. The Government objects to so much of the statement of qualifications as is based upon Water Power Resource Papers on the ground that the same are hearsay, and no opportunity is afforded to cross-examine their author J. T. Johnston or other authors thereof.

The Court: The objection is sustained.

Mr. Lewis: Exception.

52.

Mr. Lewis: 22. Respondents further offer to prove by said witness that he has heard or has read the official report-

er's transcript of all the testimony given by Adolph F. Meyer in this proceeding relating to the facts and conditions of the Lake of the Woods, of the watershed of said lake, of the storage reservoir of said lake, of the Winnipeg River, of the Power developments and other works in said lake and river, of the control that has been exercised and the use that has been made of the waters of said lake and river, and particularly of the storage reservoir of said lake by means of said power developments and other works, also the testimony of said Adolph F. Meyer as to the facts and conditions of the resources and capacities of all of said waters for power and other purposes.

53.

23. Respondents further offer to prove by said witness Gardner S. Williams that he has made a study of the advantage to be derived by the power projects at the outlets of the Lake of the Woods and in the Winnipeg River by the utilization of the storage possibilities of the Lake of the Woods in conformity with the provisions of the treaty of 1925.

54.

24. Respondents further offer to prove by said wit-
86 ness that the utilization of the storage capacity of the Lake of the Woods pursuant to said treaty will result in an increase of the continuous water horse power which can be developed by said water power projects of approximately 200,000 such horse power.

Mr. Harries: 22-23-24. The Government objects to the foregoing testimony upon each of the grounds stated immediately following the last of the offers of proof of respondents; and further objects to such testimony on the ground that the same is without proper foundation; and on the ground that the evidence is immaterial because there is no evidence that existing power plants can utilize the continuous flow from increased storage and so develop 200,000 additional horse power; nor that there is a market for the same.

The Court: The objection is sustained.

Mr. Lewis: Exception.

55.

Mr. Lewis: 25. Respondents further offer to prove by said witness that the significance and advantage of obtaining a constant stream flow and continuous horse power which would be obtained through the utilization of the storage capacity of said lake is that since there is no other available

source of power in the area furnishing a market for the output of the aforesaid developments sufficient to supply the required power at times when the output of said developments under natural conditions would be low, it is important to obtain a constant stream flow by utilizing the Lake of the Woods storage, thus making it possible to deliver a substantially uniform quantity of power from day to day and month to month, limiting the variation in the quantity of available power to a minimum.

Mr. Harries: 25. The Government objects to the foregoing testimony on the ground that the Court will take judicial notice of its falsity by reason of the available sources
87 of power on the English and Nelson Rivers sufficient to supply the same market without any resort to Lake of the Woods storage; and an additional source in the Saskatchewan River within 150 miles of Winnipeg capable of developing 325,000 horse power.

The Court: Objection sustained.

Mr. Lewis: Exception.

56.

Mr. Lewis: 26. Respondents further offer to prove by said witness that he has informed himself concerning the demand and market for power in the territory supplied from the aforesaid projects, and that he has found that the power requirements of said area are now or will be in the very near future sufficient to consume the entire output of said power projects with the full utilization of the storage capacity of the Lake of the Woods as contemplated by the treaty of 1925.

Mr. Harries: 26. The Government objects to the foregoing testimony on the ground that it is speculative and conjectural and without any foundation in the way of proof of what the market demand is or will be.

The Court: The objection is sustained.

Mr. Lewis: Exception.

57.

Mr. Lewis: 27. Respondents further offer to prove by said witness that he has studied the physical and international conditions and aspects of the Lake of the Woods storage reservoir with respect to the practicability of acquiring the flowage easements necessary to the development and utilization of said reservoir, and that he has formed an opin-

ion with reference thereto, based upon his said study and upon his knowledge and experience gained as stated in the foregoing testimony and offers of proof. That it is his opinion and firm belief that it would be entirely practicable for the
88 interests or authorities operating or controlling the power projects to acquire and unify the flowage easements necessary to the development and utilization of the Lake of the Woods storage reservoir as contemplated by the treaty of 1925.

Mr. Harries: 27. The Government objects to the foregoing testimony on the ground that it constitutes a conclusion of law on the part of the witness, is incompetent, and without foundation; that witness has not qualified as an expert in international diplomacy and has testified to no facts which would make him legally competent to give the foregoing opinion.

The Court: The objection is sustained.

Mr. Lewis: Exception.

58.

Mr. Lewis: 28. Respondents further offer to prove by said witness that it is his opinion and firm belief that if it were not for the treaty of 1925 and governmental action taken thereunder said interests or authorities would unquestionably have acquired the flowage easements necessary to the development and utilization of said storage reservoir, and that it would have been entirely practicable for them so to do.

Mr. Harries: 28. The Government objects to this testimony on the ground that it is without any foundation; is speculative and conjectural; and the opinion of the witness is immaterial, since as a matter of law the action of the interest described could not have affected the market value of the properties involved. The testimony is further objected to as a conclusion for which no foundation has been laid; and as being completely refuted by the fact that such authorities referred to did not even seek to acquire such easements.

The Court: The objection is sustained.

Mr. Lewis: Exception.

59.

Mr. Lewis: 29. Respondents further offer to prove by said witness that the reason for the opinion expressed
89 by him in the foregoing offer of proof is that said storage reservoir is of such substantial advantage and

benefit to the interests of authorities controlling or operating power projects at the outlets of said lake and in the Winnipeg River that it would be to their best interests as a matter of sound business policy to acquire said flowage easements.

Mr. Harries: 29. The Government objects to this testimony as speculative and conjectural and without any foundation by proof of knowledge of the costs of plant, site, operation, personnel, taxes, financing, marketability and possible earnings.

The Court: Objection sustained.

Mr. Lewis: Exception.

60.

Mr. Lewis: 30. Respondents further offer to prove by said witness that there is no general market and no general market value for flowage easements as those terms are customarily used and understood. That the fair value or the fair market value, as it is sometimes called, for flowage easements is, as a matter of common practice in connection with the projects involving such easements, arrived at on the basis of the particular facts and circumstances affects each individual case.

Mr. Harries: 30. The Government objects to the foregoing testimony except insofar as it corroborates the Government's testimony that market values have not been affected by the storage possibilities of the lake. The grounds of the objection are (1) that the statement that there is "no general market" is a conclusion of law, has no proper foundation and is incompetent; (2) that the absence of an "easement market" is immaterial in condemnation proceedings where the issue is the extent of damage to the entire
90 tract on which the easement is imposed; (3) that a common practice cannot overcome the well defined legal measure of market value as the differences in value of the whole property affected, before and after the taking.

The Court: The objection is sustained.

Mr. Lewis: Exception.

61.

Mr. Lewis: 31. Respondents further offer to prove by said witness that there is an established custom and practice in connection with such projects whereby the fair value, or

the so-called fair market value, of flowage easements is arrived at. That he knows that said custom and practice is, and that it is as set forth in the next preceding offer of proof.

Mr. Harries: 31. The Government objects to the admission of this testimony for the reason that it frankly admits that "fair value" is not the same as "market value"; and that all testimony of this witness as to values is therefore wholly incompetent.

The Court: The objection is sustained.

Mr. Lewis: Exception.

62.

Mr. Lewis: 32. Respondents further offer to prove by said witness that in his opinion, based upon his experience and knowledge, the fair value or so-called fair market value of the flowage easements necessary to be acquired for the utilization of the Lake of the Woods storage reservoir as contemplated by the treaty of 1925 would be arrived at, in accordance with said custom and practice, if said flowage easements were sought to be acquired by the interests or authorities operating or controlling the power projects, through the usual methods of negotiation and bargaining between the willing seller and a willing buyer, both fully informed and under no compulsion to buy or sell. That the fair value or so called fair market value so arrived at would be the result of the exercise of the best judgment on either side, and
91 would represent a value somewhere between the value of the lands to their owners and the value of the easements to the interests or authorities seeking to acquire them. That said fair value or so called fair market value would not be based upon nor determined by the necessities of the interests seeking to acquire them nor upon the profits or benefits which such interests might derive therefrom, nor would it be based upon the use which the owners of said lands might at the time be able to make thereof, but that it would be determined and arrived at in the manner above described.

Mr. Harries: 32. The Government objects to this testimony as a conclusion of law; as being without proper foundation; that the method named refers to an entire reservoir collectively, and not to individual parts thereof and has no relation to taking easement by condemnation; and upon the ground that it is immaterial since the impossibility of unifying ownership of the necessary rights on the lake shore preclude the allowance of any added value by reason of storage possibilities, as a matter of law.

The Court: The objection is sustained.

Mr. Lewis: Exception.

63.

Mr. Lewis: 33. Respondents further offer to prove by said witness that from his said knowledge and experience and particularly from his acquaintance with the facts and circumstances affecting said flowage easements and the development of said storage reservoir, he has formed an opinion as to the fair value or so called fair market value of the three flowage easements involved in these proceedings.

Mr. Harries: To which the Government objects as immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

92 64.

Mr. Lewis: 34. Respondents further offer to prove by said witness that the fair value or so called fair market value of the flowage easements upon the respective lands of the respondents in the present proceeding is as follows:

On the lands of Elias Olson, $10,800;

On the lands of Harry Brewster, $13,300;

On the lands of Randor G. Karlson, $9,400.

Mr. Harries: 34. The Government objects to the foregoing testimony upon the grounds that (1) "so called fair market value of the flowage easements" is not a proper measure of value; (2) that the value of an easement is not a proper measure of damage in condemnation proceedings but the difference in value of the entire tract must be considered; (3) that no proper foundation has been laid; (4) that the testimony is incompetent; (5) that upon each ground hereinafter stated as an objection to each item in respondents' offer of proof and set forth in full at pages (insert page numbers where objections appear following Meyer's testimony) of the record.

The Court: The objection is sustained.

Mr. Lewis: Exception.

65.

Mr. Lewis: 35. Respondents further offer to prove by said witness that he has considered the fair values or so called fair market values of said flowage easements as set

forth in the foregoing offers of proof, together with the corresponding fair values or so called fair market values of all the other flowage easements necessary to the development and utilization of said reservoir, as compared with the results which may be derived by the purchasers from the acquisition and utilization of said easements, and also with the use or uses to which the owner of said lands might devote the same for other than flowage purposes.

Mr. Harries: 35. The Government objects to this
93 testimony upon the ground that the witness has not shown himself qualified to appraise uses of the lands for purposes other than power.

The Court: The objection is sustained.

Mr. Lewis: Exception.

66.

Mr. Lewis: 36. Respondents further offer to prove by said witness that he has made the comparison mentioned in the preceding offer of proof for the purpose of checking the soundness of his opinion as to the fair value or so called fair market value of said easements, and for the purpose of checking the soundness of his opinion that the interests or authorities owning or controlling the power projects would acquire and utilize said flowage easements, if the United States had not undertaken by the treaty to acquire the same.

Mr. Harries: 36. To which the Government objects upon the ground that the witness is lifting himself by his bootstraps and checking his opinion by his comparison and his comparison by his opinion.

The Court: The objection is sustained.

Mr. Lewis: Exception.

67.

Mr. Lewis: 37. Respondents further offer to prove by said witness that as a result of his checking and comparisons made as set forth in the foregoing offers of proof, based upon his knowledge and experience, he has determined that the advantage and benefit which will be derived by the interests or authorities operating and controlling said power projects on account of the utilization of said flowage easements and said reservoir will exceed in value by more than two fold the entire amount which said flowage easements required for said reservoir would cost, based upon their fair values or so called fair market values arrived at in the manner heretofore described by said witness.

Mr. Harries: 37. To which the Government objects
94 upon the ground that it assumes the cost of acquiring flowage easements.

The Court: The objection is sustained.

Mr. Lewis: Exception.

68.

Mr. Lewis: 38. Respondents further offer to prove by said witness that the interests or authorities utilizing said flowage easements and said reservoir would reasonably be able to realize an additional annual profit or benefit as a result of such utilization exceeding $1,200,000, after allowing interest at the annual rate of eight per cent on the investments required for the acquisition of said flowage easements and reservoir on the basis of the values arrived at as heretofore described.

Mr. Harries: 38. The Government objects to this testimony upon the ground that no foundation has been laid; and that the testimony is speculative and conjectural and based upon facts not in evidence; that it assumes without any proof the cost of developing power, the effect of rate-fixing, operation and capital costs, and is incompetent; it assumes an annual rate of earnings without foundation by proof of market possibilities; does not include the time for which such earnings may be expected to continue; and is irrelevant because as a matter of law no undertaker could make the development because of the impossibility of unifying the necessary shore rights. The Government also objects to all of the proposed testimony of Gardner S. Williams and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: And in that connection, I will state to the Court that we will have a very short additional offer
95 to prove by Mr. Williams, which we will present to counsel right after lunch.

The Court: Very well.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 44.

(Document marked Respondents' Exhibit 44 for identification by the reporter.)

Mr. Lewis: Respondents offer to prove by the witness Linus Landby the facts set forth in evidence in Respondents' Exhibit 44, and state to the Court that if the witness Linus Landby were permitted to testify that he would testify to the facts set forth in said exhibit.

Mr. Harries: The Government objects to the offered testimony upon the grounds set forth in the typewritten sheet attached to copy of the offered testimony of Mr. Landby, and I understand that the reporter will mark as exhibits all of the objections presented by the Government, so that they may appear following the testimony offered on the part of the respondents.

And I ask to have this marked as a Government's Exhibit.

(Document marked Government's Exhibit 102 for identification by the reporter.)

69.

Mr. Lewis: 39. Respondents offer to prove by the witness Linus Landby, duly sworn and on the stand ready to testify, that he has been a resident of Roseau County, Minnesota, for more than twenty years. That he is a farmer. That he is a son of A. M. Landby, who is a former state senator from Roseau County, and who was one of the residents of said county who took part in attempting to establish the rights of the owners of property flooded by the waters of the Lake of the Woods to compensation and damages for the use of said property for flowage and storage purposes. That during the year 1924 said Linus Landby purchased a tract of 120 acres, practically all of which is below contour 1064 on the shore of said lake. That
96 said tract does not adjoin his farm upon which he resides, but is a considerable distance therefrom. That he purchased said tract solely because it was valuable and was reputed to be valuable for flowage and storage purposes. That he paid a larger sum for said tract than he otherwise would have paid on account of the fact that it was valuable and was reputed to be valuable for flowage and storage purposes. That he would not have purchased said tract at all except for such value and reputed value.

Mr. Harries: 39. To which the Government objects upon the ground that the self-deception of the witness, and his ignorance of the law which had already conferred upon the United States a right to overflow his lands in aid of navigation to an unknown height, and his ignorance of other obstacles which rendered it impracticable as a matter of law

to unify the ownership required for a reservoir, render it immaterial why he bought or that he paid more than he would have paid had he actually known the facts of which he was aware constructively, and in legal effect. The Government also objects to all of the proposed testimony of Linus Landby and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The Government's objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 45.

(Document marked Respondents' Exhibit 45 for identification by the reporter.)

Mr. Lewis: Respondents now offer to prove by the witness Theodore F. Spreiter the facts set forth for evidence in Respondents' Exhibit 45, and I will state to the Court that if such witness were permitted to testify that he
97 would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to such testimony upon the grounds as stated in the sheet attached to the copy of the proposed testimony of Mr. Spreiter, and ask to have it marked as Government's Exhibit 103.

(Document marked General Government's Exhibit 103 for identification by the reporter.)

70.

Mr. Lewis: 40. Respondents offer to prove by the witness Theodore F. Spreiter, duly sworn and on the stand ready to testify, that he is a resident of the village of New Port, Washington County, Minnesota, and is president of the Farmers Terminal State Bank of said village. That from 1912 to 1918 he was a resident of the village of Warroad, Roseau County, Minnesota, and was the organizer and cashier of the Security State Bank of said village. That through his connection with said bank he became acquainted with certain sales and transfers of land along Lake of the Woods below contour 1064 in said county during said period. That the number of said sales was small. That in each instance with which he was familiar the sale and transfer was made as a forced sale and because the grantor was in financial distress.

Mr. Harries: 40. The Government objects to this testimony upon the following grounds: (a) neither the number of sales nor the fact of sales below contour 1064 is material because the lands affected lie above as well as below the level; (b) financial distress is a mental state as to which the witness is not qualified to testify; (c) witness does not profess to be familiar with all sales (d) the characterization of sales as "forced" is a conclusion of law and/or fact and oral testimony is not the best evidence thereof.

The Court: The objection is sustained.

Mr. Lewis: Exception.

71.

Mr. Lewis: 41. Respondents further offer to prove by said witness that he knows of two or three such forced
98 sales wherein the purchaser purchased the land in question solely because of its value and reputed value for flowage and storage purposes, and that he knows of his own knowledge that the purchaser paid a higher price for the land than he would have paid except for the fact that the land was valuable and was reputed to be valuable for flowage and storage purposes;

Mr. Harries: 41. The Government objects to this testimony on the ground that motive of purchase is immaterial; and no foundation has been laid for proof thereof; on the ground that reputed values are immaterial if in fact such reputation was false because the required land could not be unified save by the joint action of National Sovereignties and if the hope engendered by such false repute was as a matter of law so speculative and conjectural that it could not influence market values. That such false repute ignored existing laws conferring a right of flowage on the United States in aid of navigation to an unknown water level and hence the hope of unification could not as a matter of law enhance market values. The Government also objects to all of the proposed testimony of Theodore F. Spreiter and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The Government's objection will be sustained.

Mr. Lewis: Exception.

Mr. Lewis: I now ask to have this document marked as Respondents' Exhibit 46.

(Document marked Respondents' Exhibit 46 for identification by the reporter.)

Mr. Lewis: The respondents next offer to prove by the witness Barney Arneson the facts recited and set forth in Respondents' Exhibit 46, and state to the court that if said witness Barney Arneson were permitted to testify that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to such testi-
99 mony upon the grounds as stated upon the two typewritten sheets attached to the copy of the proposed testimony of Barney Arneson, and I ask to have it marked as General Government's Exhibit 104.

(Document marked General Government's Exhibit 104 for identification by the reporter.)

72.

Mr. Lewis: 42. Respondents offer to prove by the witness Barney Arneson, now on the stand, that he has been a resident of Warroad, Minnesota, since 1897. That he lives on a farm in the vicinity of the village of Warroad and that he is also engaged in the fishing industry. That he is a married man with a family and that he owns several pieces of property both within and without the village of Warroad.

73.

43. That he remembers the completion of the Norman Dam and the putting in of the stop logs in said dam during the year 1898. That he filed on a homestead in Roseau County not far from the village of Warroad in 1898, and that during the year 1899 his land, as well as other low-lying lands adjacent to the source of the Lake of the Woods, was flooded by the waters of said lake due to the presence and operation of the Norman Dam at one of the outlets of said lake.

74.

44. That during the year 1899 and 1900 the property owners along the shores of the Lake of the Woods had made inquiry and investigation to ascertain the cause of said flooding and at that time learned that said lake was being used as a storage reservoir for the development of water power.

75.

45. That on discovering that the waters of the Lake of the Woods were used for power purposes and that said lake was being used as a storage reservoir and that the ad-

jacent lands were being flooded and were used by the power companies to form said storage reservoir, it became a matter of common report, reputation, rumor and conversa-
100 tion among said property owners and among the residents in said area generally that the lands so flooded were of great value for storage purposes and bore such reputation, and that the said lands so flooded were more valuable than were the higher lands which were not flooded and that their highest value was for flowage purposes. That said lands so flooded were used by the power companies owning and operating the said Norman Dam and shortly thereafter were used by other companies owning and operating dams and power plants at the other outlets of said lake and in the Winnipeg River as and for a storage reservoir to equalize the flow of said water for power purposes.

Mr. Harries: 42, 43, 44, 45. The Government objects to the foregoing testimony upon the grounds that rumors, etc., of value for flowage purposes and common report that such values were highest are immaterial, since such rumor and report could not, as a matter of law, be reflected in market values because of the impracticability of unifying ownership of the flowage rights.

The Court: The objection is sustained.

Mr. Lewis: Exception.

76.

Mr. Lewis: 46. That during the years 1903, 1904 and 1905 the said property owners organized themselves into an association for the purpose of controlling the use value of their said properties which were so being flooded and used by said power companies, and for the purpose of obtaining relief from said continued trespass on their property by bringing about either a discontinuance of said trespass or the payment of just compensation therefor. That said association employed counsel to advise and to represent them, and that among the counsel so employed were Mr. William Taylor, The Honorable Halvor Steenerson, Member of Congress from the Ninth Minnesota Congressional District, Honorable Charles Loring, now a member of the Su-
101 preme Court of the State of Minnesota, the Honorable G. A. Youngquist, now assistant United States Attorney General, C. E. Berkman, Esq., an attorney at law, Chisholm, Minnesota, Messrs. Middleton & Middleton, Attorneys at Law of Baudette, Minnesota, Honorable Albert Chilgren, Attorney at Law of Baudette, Minnesota, Mr. Bert Hanson, The Honorable Julius J. Olson, now a judge of the district

court of the State of Minnesota for the fourteenth judicial district, and the attorneys of record in these proceedings.

Mr. Harries: 46. Objected to as immaterial.

The Court: Objections sustained.

Mr. Lewis: Exception.

77.

Mr. Lewis: 47. That the said property owners at all times since 1903 or 1904 have been associated together and organized and have been represented by legal counsel. That during all of said period from 1899 down to the present time, it has been a matter of common report, rumor, reputation and conversation among the said property owners and other residents of said area that the said lands so flooded possessed a high value for flowage purposes and that they were more valuable for flowage purposes than for any other purpose. That during substantially all of said period it was a matter of common report, rumor, reputation and conversation among said property owners and other residents of said area that the use of said lands for flowage and storage purposes as so made by said power companies entitled the owners of said land to recover substantial compensation and damages on account of said use.

Mr. Harries: 47. To this testimony the Government objects on the same grounds as stated in its objection to paragraphs 42, 43, 44 and 45.

The Court: The objection is sustained.

Mr. Lewis: Exception.

78.

Mr. Lewis: We further offer to prove by the said
102 witness Barney Arneson that for a long period of years he has served as official assessor of large areas bordering on the shores of the Lake of the Woods and that accordingly he became intimately acquainted with said properties so flooded and the owners thereof; that he has during all of said times made a close observation and study of transfers of property within the said area so flooded and that he has never known or heard of a flowage easement being bought or sold along the shores of the Lake of the Woods.

Mr. Harries: 48. To which the Government objects upon the ground that such testimony is immaterial and does not go to the proper measure either of damages or market value, inasmuch as the award in condemnation must be based on the

diminution of value of the entire tract affected and not upon the market price of a flowage easement.

The Court: The objection is sustained.

Mr. Lewis: Exception.

79.

Mr. Lewis: 49. Respondents further offer to prove by said witness Arneson that the sale and transfer of lands within said flooded area had been extremely infrequent and that he has conducted an investigation and has ascertained the facts and circumstances surrounding a large number of said transfers and that in practically every instance of such transfer the said transfer was made on account of financial distress or as a forced sale.

Mr. Harries: 49. Objected to as contradictory; a "large number" and "extreme infrequency" cannot co-exist; objected to as not the best evidence of "forced sales", as incompetent in alleging the state of mind described as "financial distress",—it may have been only embarrassment.

The Court: Objection sustained.

Mr. Lewis: Exception.

80.

Mr. Lewis: 50. Respondents further offer to prove
103 by said witness Arneson that in many of the sales and transfers referred to in the foregoing paragraph and offer of proof, the witness knows that said sales and transfers were made to persons who acquired said properties on account of their value for flowage and storage purposes; that in each instance the person so purchasing and acquiring said lands which had been so flooded paid a large price therefor on account of their value and reputed value for flowage purposes, and that except for the fact that said lands were reputed to be valuable for flowage purposes the persons so acquiring the same would not have purchased them at all.

Mr. Harries: 50. To which the Government objects upon the following grounds: It is immaterial that the buyers referred to acted under a mistake of law as to the practical possibility that adaptability for flowage could or did affect the market value of the property transferred.

The Court: The objection is sustained.

Mr. Lewis: Exception.

81.

Mr. Lewis: 51. Respondents further offer to prove by said witness Arneson that in the year 1920 he owned and resided on his own homestead, upon which he had filed in the year 1898 or thereabouts, and on which he had resided ever since, which were riparian lands bordering on said lake, and that during said year he purchased a tract of 160 acres practically all of which was below contour 1064, and that he purchased the said tract because of its value and reputed value for flowage and storage purposes, that he paid a larger price therefor than he would have paid except for said flowage and storage value and that he would not have purchased said tract at all except for the fact that he considered it valuable for flowage and storage purposes.

Mr. Harries: 51. To which the Government objects on the ground last above stated.

104 The Court: The objection is sustained.

Mr. Lewis: Exception.

82.

Mr. Lewis: 52. Respondents further offer to prove by said witness Arneson that the owner of said tract of land which he purchased, as mentioned in the foregoing paragraph and offer to prove, was in financial distress at and prior to said sale and transfer; that a mortgage was due against said lands and that the said sale and transfer was made on account of said owner's inability to meet the payments due on said mortgage,

Mr. Harries: 52. The Government objects to this as not being the best evidence; as immaterial; and on the ground that financial distress is not a gauge of market value, and as belying the claim in paragraph 51 that witness paid more than he otherwise would.

The Court: The objection is sustained.

Mr. Lewis: Exception.

83.

Mr. Lewis: 53. Respondents further offer to prove by said witness Arneson that during the time when the investigations and hearings were being conducted by the International Joint Commission at Warroad and elsewhere with reference to Lake of the Woods prior to 1917, he attended a num-

ber of said hearings and testified as a witness thereat; that on numerous occasions he heard members and advisers of said International Joint Commission state in public meeting attended by a large number of property owners and residents of said area that said lands so flooded were more valuable for flowage and storage purposes than for any other purpose and that when the power resources of said Lake of the Woods basis were fully developed the flowage and storage rights of said lands so flooded would possess a value beyond the fondest dreams of their owners; that said witness Arneson, as well as a large number of other property owners, stated to said International Joint Commission that he and they would not sell their said lands so flooded for any price representing their value for agricultural purposes.

Mr. Harries: 53. Objected to on the ground that "fondest dreams" are not a measure of market value, and statements to the International Joint Commission are immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

84.

Mr. Lewis: 54. Respondents further offer to prove by said witness Arneson that following the publication and circulation of the final report of said International Joint Commission in the year 1917, it was a matter of common report, rumor, reputation and conversation among the people generally residing in said area and among said property owners that said International Joint Commission had found and reported that the said lands so flooded were more valuable for flowage and storage purposes than for any other use or purpose.

Mr. Harries: 54. Objected to on the ground that rumor is not evidence, and the stated findings of the International Joint Commission are not the best evidence, and are immaterial; and its finding of a higher "use value" for storage is not a measure of market value. The Government also objects to all of the proposed testimony of Barney Arneson and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The objection will be sustained.

Mr. Lewis: Exception.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 47.

106 (Document marked Respondents' Exhibit 47 for identification by the reporter.)

Mr. Lewis: Respondents offer to prove by the witness H. M. Heneman, the facts set forth for evidence in Respondents' Exhibit 47, and state to the Court that if said witness were permitted to testify, that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to the testimony of H. M. Heneman on the grounds as stated in the two typewritten sheets attached to the copy of his proposed testimony.

And may the record show, Your Honor, that the objections on the part of the Government go to each specific item of proof offered by the respondents, as stated in the typewritten statements of objection.

And I ask to have the document marked as Government's Exhibit 105.

(Document marked Government's Exhibit 105 for identification by the reporter.)

85.

Mr. Lewis: 55. Respondents offer to prove by the witness H. M. Heneman, duly sworn and on the stand ready to testify, that he is a resident of the village of Warroad, Roseau County, Minnesota, and is cashier of the Security State Bank of said village, and has been such for 13 years last past. That during his entire period of residence in said village he has been familiar with the common report, reputation, and conversation among the people of said village and vicinity concerning the lands below contour 1064 on the shores of the Lake of the Woods which have been and are flooded and used for flowage and storage purposes in connection with the formation and maintenance of the Lake of the Woods storage reservoir. That for a number of years he has been secretary and treasurer of Cloverleaf Federal
107 Farm Loan Association. That in connection with his duties as cashier of said bank and as secretary of said association, he became and was during the entire period of his said residence in said village familiar with a very large proportion of the sales and transfers of property in the vi-

cinity of Lake of the Woods in said Roseau County during said time.

Mr. Harries: 55. The Government objects to the reception of the proposed proof on the ground that it assumes a common report, reputation and conversation without proof thereof; that such report, reputation and conversation are immaterial, irrelevant and incompetent; that these condemnation proceedings are not limited to lands below contour 1064.

The Court: The objection is sustained.

Mr. Lewis: Exception.

86.

Mr. Lewis: 56. Respondents further offer to prove by said witness that only a very small number of sales and transfers of land below contour 1064 have been made in Roseau County during the period of his said residence in said county. That he personally is acquainted with the facts and circumstances connected with a very large proportion of such transfers. That he knows of his own knowledge that in the large majority of cases such sales and transfers as have been made on lands below contour 1064 were made for the reason that the grantors were in financial distress and that such sales were made under such circumstances as to make them forced sales.

Mr. Harries: 56. The Government objects to this testimony on the ground that the number of sales of lands below contour 1064 is immaterial; that the financial distress of the grantors of such lands or any other lands is immaterial; that testimony by this witness as to the state of mind of the grantors is incompetent, and no foundation has been
108 laid for proof thereof; that the characterization of sales as forced sales is a conclusion for which no foundation has been laid, and is not the best evidence.

The Court: The objection is sustained.

Mr. Lewis: Exception.

87.

Mr. Lewis: 57. Respondents further offer to prove by said witness that he has never known or heard of a flowage easement being either bought or sold in Roseau County. That he is familiar to some extent with the transfers of land in the vicinity of Lake of the Woods in Lake of the Woods County, and that he has never known or heard of a flowage easement being either bought or sold in said county.

Mr. Harries: 57. The Government objects to this testimony as being immaterial and as not going to the proper measure of damage in this condemnation proceeding; and on the ground that the testimony has no tendency to prove that no such sales have been made; and upon the grounds stated by the Government at pages 233 to 242 of the record.

The Court: The objection is sustained.

Mr. Lewis: Exception.

88.

Mr. Lewis: 58. Respondents further offer to prove by said witness that in a number of cases of the sale and transfer of tracts of lands in Roseau County including lands below contour 1064, he directly assisted and counseled the parties in connection with the transaction, and has personal knowledge of all the details thereof. That in connection with said sales and transfers including lands below contour 1064 the use and value of such lands for flowage and storage purposes constituted a material consideration affecting such sales and transfers. That such use and value for flowage and storage purposes caused the purchasers in said transactions to pay a higher price for said lands than they otherwise would have paid except for such use and value. That the value
109 and reputed value of said lands below contour 1064 for flowage and storage purposes was a subject of negotiation in the consummation of said sales and transfers.

Mr. Harries: 58. The Government objects to this testimony as being too indefinite to be considered; as being hearsay and a conclusion as to the causes of prices paid; on the ground that the use of the lands in Roseau County constituting a part only of the lands required for a reservoir; and leaving out of account lands in Lake of the Woods County; and Canada; cannot furnish any measure of the value of any separate tract or group of tracts less than the whole number required.

The Court: The objection is sustained.

Mr. Lewis: Exception.

89.

Mr. Lewis: 59. Respondents further offer to prove by said witness that only a very small number of sales and transfers of lands below contour 1064 have been made in Roseau County during the period of his residence. That he is per-

sonally acquainted with a large percentage of such sales and transfers, and that by far the larger portion of said sales and transfers with which he is familiar were made for the reason that the grantors therein were in financial distress, and that said sales were in fact forced sales. That the sales and transfers referred to in the consummation of which he participated were likewise forced sales, and were made for the reason that the grantors therein were in financial distress.

Mr. Harries: 59. The Government objects to this testimony on the ground that the distress of the grantors is immaterial and no foundation has been laid for proof of the mental state of the grantors; that the description of sales as "forced" is a conclusion and not the best evidence.

The Court: The objection is sustained.

Mr. Lewis: Exception.

110 90.

Mr. Lewis: 60. Respondents further offer to prove by said witness that during the period of his residence in Roseau County he was familiar with a large proportion of the sales and transfers of real estate in the vicinity of Lake of the Woods in said county, and that he never knew or heard of a flowage easement being bought or sold.

Mr. Harries: 60. The Government objects to this testimony as immaterial; as not going to the true measure of damage, which must be based upon the effect of the taking upon the entire tract and must not be limited solely to the land within the physical boundaries of the space that is overflowed; for the easement carries with it all incidental appurtenances and involves all consequential damage. For example, if the easement cut off a road leading to the land on which the easement was imposed, or submerged the foreshore of a cliff so that boats could no longer land on the property, these facts must be regarded in appraising the damage. If it be said that the road and boat landing are not involved in the highest use to which the land is adapted, respondents is thrown back on the basic claim that availability could not, as a matter of law, affect market prices because of the practical impossibility of uniting ownership of all lands or even of all easements except by the intervention of eminent domain. The Government also objects to all of the proposed testimony of H. M. Heneman and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer."

The Court: Yes, the record may so show, and the objection will be sustained.

Mr. Lewis: Exception.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 48.

111 (Document Marked Respondents' Exhibit 48 for Identification by the Reporter.)

Mr. Lewis: Respondents offer to prove by the witness Halvor Robberstad the facts set forth in Respondent's Exhibit 48 and state to the Court that if Mr. Robberstad were permitted to testify that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to such testimony upon the grounds set forth in its written statement of objections attached to the proposed testimony of Halvor Robberstad, and we ask to have this marked as Government's Exhibit number 106.

(Document Marked Government's Exhibit 106 for Identification by the Reporter.)

91.

Mr. Lewis: 61. Respondents offer to prove by the witness Halvor Robberstad, duly sworn and on the stand ready to testify, that he is a resident of the village of Warroad, Roseau County, Minnesota. That for more than two years he has been U. S. Postmaster in said village of Roosevelt in said County, and that for a number of years he was the president of the village council of said village. That after transferring his residence from Roosevelt to Warroad he was for a number of years president of the village council of Warroad. That he has lived in said county of Roseau during the past twenty-five years.

92.

62. Respondents further offer to prove by said witness that during said entire period of twenty-five years he has been familiar with the fact that certain lands in the vicinity of Lake of the Woods were flooded and used for flowage and storage purposes in connection with the formation of a storage reservoir in said lake in the development of water power. That it is a matter of common report, reputation, and conversation among the people of said Roseau County generally

112 that said lands so flooded were very valuable on account of their use for flowage and storage purposes, and the said lands were more valuable for said purposes than for any other purpose.

Mr. Harries: 61-62. To all of which the Government objects as immaterial, inasmuch as value for storage could not as a matter of law be reflected in market values because of the impracticability of realizing the values alleged.

The Court: The objection is sustained.

Mr. Lewis: Exception.

93.

Mr. Lewis: 63. Respondents further offer to prove by said witness that in 1917 he purchased an eighty acre tract all of which is below contour 1064 on the shore of said lake. That said tract was completely flooded during the preceding year, 1916, and that considerable portions of the same were flooded at the time he purchased it in 1917. That he purchased said tract solely on account of its value and reputed value for flowage and storage purposes. That he paid a larger price for said land than he otherwise would have paid because of its availability and use for such flowage and storage purposes. That in fact he would not have purchased said land at all except for the fact that it was so available and was so used.

94.

64. Respondents further offer to prove by said witness that his grantor of said tract at the time of said sale and transfer was in financial distress and that said transfer was the result of a forced sale.

Mr. Harries: 63-64. The Government objects to the evidence in the two foregoing paragraphs on the ground that it is incompetent, without proper foundation, purports to describe a state of mind, is not the best evidence of a forced sale, is immaterial and irrelevant to the issue of damages because as a matter of law, of which witness was constructively aware, the value for storage purposes could not affect the market value of the land.

113 The Court: The objection is sustained.

Mr. Lewis: Exception.

95.

Mr. Lewis: 65. Respondents further offer to prove by said witness that for a number of years between 1919 and 1929 he served as a member of a committee of the Commercial Club of the Village of Warroad, which committee was charged with the responsibility of protecting the rights and

interests of the Village of Warroad in connection with the artificial raising of the waters of said Lake of the Woods.

Mr. Harries: 65. Objected to as immaterial.

The Government also objects to all of the proposed testimony of Halvor Robberstad and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit 49.

(Document Marked as Respondents' Exhibit 49 for Identification by the Reporter.)

Mr. Lewis: Respondents next offer to prove by the witness John A. Kennedy the fact set forth in Respondents' Exhibit 49 and state to the Court that if Mr. Kennedy were permitted to testify that he would testify to the facts as set forth in said exhibit.

Mr. Harries: The Government objects to the proposed testimony of John A. Kennedy on the grounds stated in the typewritten sheet attached to his proposed testimony and I ask to have this marked as Government's Exhibit 107.

(Document Marked Government's Exhibit 107 for Identification by the Reporter.)

96.

Mr. Lewis: 66. Respondents offer to prove by the witness John A. Kennedy, duly sworn and on the stand
114 ready to testify, that he is a resident of the village of Baudette in Lake of the Woods County, Minnesota. That for thirty years he has been deputy U. S. Collector of Internal Revenue at said village of Baudette. That he first became interested in the vicinity of Lake of the Woods in the year 1886 and that for a number of years thereafter he was engaged in the cruising and timber business in said region.

97.

67. Respondents further offer to prove by said witness that shortly after the placing of the stop logs in the Norman Dam in 1898 the low lands along the shores of said lake became flooded, and thereafter were used for flowage and stor-

age purposes in connection with the development of water power. That during the early years of said period of flooding of said land he did not own any real estate in the vicinity of said lake, but that he remembers distinctly that the fact of the flooding of said land was the subject of a great deal of public and private discussion during said years, and that it was a matter of common report, reputation, and conversation during said years following 1898, and that it was a matter of common report, reputation, and conversation during said years among the people residing in the vicinity of Lake of the Woods generally that said lands so flooded in connection with the development of water power were of higher value on that account and were more valuable for flowage and storage purposes than for any other use or purpose.

66-67. The Government objects to the testimony of John A. Kennedy on the ground that discussion, report and reputation of high values which as a matter of law could not be reflected at market values are immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

98.

Mr. Lewis: 68. Respondents further offer to prove by said witness that on or about the year 1910 he became a
115 member of the association of property owners known as the Low Water Association, and that from that time down to the present time he has been a member of the Association of said property owners. That said association employed counsel to represent it and to represent the rights and interests of the property owners whose lands were so flooded. That said association at all times were active in an effort to collect compensation and damages for the use of said lands so flooded in the formation of a storage reservoir in said lake and also in obtaining for the members of said association the fair value of said lands for flowage and storage purposes. That in that connection said association employed the services and obtained the advice of men skilled and experienced in the determination of the value of flowage easements and the value of the use of property so used for flowage and storage purposes.

Mr. Harries: 68. Objected to as immaterial.

The Government also objects to all of the proposed testimony of John A. Kennedy and to each item of evidence therein contained upon each of the grounds stated immediately af-

ter the offer to prove by means of the witness Adolph F. Meyer.

The Court: Objection sustained.

Mr. Lewis: Exception.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit number 50.

(Document marked Respondents' Exhibit 50 for identification by the reporter.)

Mr. Lewis: Respondents offer to prove by the witness George C. Newton the facts stated and set forth in Respondents' Exhibit 50 and state to the Court that if Mr. Newton were permitted to testify that he would testify to the facts as set forth in said exhibit, and in connection with Mr. Newton's testimony or offer to prove, I wish to state to the Court that there will be an additional offer to prove there in connection with Mr. Newton.

116

Mr. Harries: Subject to additional objections and further offers the Government objects to the testimony offered and to each item therein upon the grounds set forth in two typewritten sheets attached to the proposed testimony of George C. Newton and I ask to have this document marked as Government's Exhibit 108.

(Government's Exhibit 108 marked for identification by the reporter.)

The Court: The objection is sustained.

Mr. Lewis: Exception.

99.

Mr. Lewis: 69. Respondents offer to prove by the witness George C. Newton, duly sworn and on the stand ready to testify, that he is forty-five years of age. That he is a resident of Iron Mountain, Michigan, and has lived there for the past ten years. That he was graduated from the University of Wisconsin in 1907 in the mechanical engineering course, and later took advanced work at said university in mechanical engineering, obtaining the advanced degree of mechanical engineer in 1921. That he is a member of the following engineering societies: American Society of Civil Engineers, being a charter member of the Duluth section of said society; American Institute of Mining and Metallurgical Engineers, Lake Superior Mining Institute. That he is a director of the Pigeon River Lumber Company, owning and operating a num-

ber of dams on the Pigeon River, being boundary waters between the State of Minnesota and the Province of Ontario, Canada. That he has had twenty-five years general engineering experience along various lines. That during the past seventeen years he has had special experience in the investigation and construction of water power, flowage and
117 reservoir projects, and in the appraisement, purchase, and sale of flowage easements and other properties connected with such projects. That during said period he has personally engaged in or been connected with the appraisement, purchase, or sale of upwards of twenty-five flowage or storage reservoirs, among which are the Cloquet River Reservoirs of the Minnesota Power and Light Company in St. Louis County, Minnesota, the Minnesota Power and Light Company's project at Kaweshiwi Falls, on Falls Lake, near Winton, Minnesota, the Menominee River developments on the border between Michigan and Wisconsin, the Dead River and Hoist Dam Reservoirs of the Cliffs Power Company in Michigan, the Paint River Reservoir in Michigan, the Flambeau Reservoir of the Chippewa and Flambeau River in Wisconsin, the North Fowl and South Fowl and Royal Lakes Reservoir on the Pigeon River on the international border between Minnesota and Canada, the Arrow Lake Reservoir at the headwaters of Arrow River, a tributary of the Pigeon River. That during the past eleven years he has been engaged as a consulting engineer, specializing in hydro-electric and mining projects. That during said period he has served as consulting engineer for the following companies, among others: Pickands-Mather Company of Cleveland, Ohio; Heineman Land & Power Company of Wausau, Wisconsin, B. C. Neely, of Crystal Falls, Michigan, Stevenson Estate of Milwaukee, Wisconsin, and Pigeon River Timber Company and other concerns interested in the development of power on the Pigeon River and tributaries.

100.

70. Respondents further offer to prove by said witness that he is personally acquainted with the promotion and development of a number of hydroelectric projects in international boundary waters between the United States and the Dominion of Canada, among which are the St. John River
118 Power Company project in the St. John River, being boundary waters between the State of Maine and the Province of New Brunswick, and the projects of the Pigeon River Lumber Company in the Pigeon River, being a part of the International boundary waters between the State

of Minnesota and the Province of Ontario. That he is acquainted with the facts pertaining to the physical and international questions and aspects involved in said developments in international waters.

101.

71. Respondents further offer to prove by said witness that he is well acquainted with the Lake of the Woods. That during the past two years he has owned and operated on said lake a cabin power boat for pleasure purposes, and has made numerous cruises in said boat throughout said lake and has become thoroughly familiar therewith and with the storage reservoir thereof. That he has made a thorough examination and study of the drainage area of said lake and reservoir and of all physical facts, features, and questions affecting or involved in the development and use of said reservoir. That he has studied and become familiar with the document known as Water Resources Statement No. 3 of the Dominion Water Power Branch, Department of the Interior of Canada, published in 1915; entitled, "Winnipeg River Power & Storage Investigation," by J. T. Johnston, also the document known as Water Power Resource Papers of the Department of the Interior of Canada, Dominion Water Power and Reclamation Surveys, Nos. 31, 54 and 57, as well as considerable other literature and engineering and statistical data and information relating to the power resources and developments of the Lake of the Woods and the Winnipeg River. That he has visited and inspected the power projects at the outlets of the Lake of the Woods and in the Winnipeg River, and that he knows the power capacities of said lake and river and the extent of the development thereof up to the present time. That he
119 has visited the city of Winnipeg and the Villages of Kenora and Rainy River, and intervening points in Canada, and the Villages of Warroad, Baudette, and intervening points in the State of Minnesota, as well as many other points around the shores of Lake of the Woods in Minnesota and Canada. That he is familiar with the character of the lands involved in these condemnation proceedings.

Mr. Harries: 71. The Government objects to the use of Water Resources Papers and other underscribed documents as hearsay, not affording opportunity for examination, and as untested as to accuracy.

The Court: The objection is sustained.

Mr. Lewis: Exception.

102.

Mr. Lewis: 72. Respondents further offer to prove by said witness that he has heard or has read the official reporter's transcript of all the testimony given by Adolph F. Meyer in this proceeding relating to the facts and conditions of the Lake of the Woods, of the watershed of said lake, of the storage reservoir of said lake, of the Winnipeg River, of the power developments and other works in said lake and river, of the control that has been exercised and the use that has been made of the waters of said lake and river and particularly of the storage reservoir of said lake by means of said power developments and other works; also the testimony of said Adolph F. Meyer as to the facts and conditions of the resources and capacities of all of said waters for power and other purposes.

103.

Mr. Lewis: 73. Respondents further offer to prove by said witness that he is familiar with the rules, regulations and practice of the International Joint Commission, the Federal Power Commission of the United States, and the Department of Lakes, Forests, and Mines of the Province of Ontario, Canada, with reference to the development and establishment of storage reservoirs, power projects and other projects
120 in international boundary waters. That he has prepared applications for such projects for presentation of said International Joint Commission and for other authorities.

104.

Mr. Lewis: 74. Respondents further offer to prove by said witness that the physical and international aspects of the development and use of the Lake of the Woods reservoir are similar in character to the physical and international aspects of said St. John's River Power Company development, which has been carried out by private enterprise under authorization of said International Joint Commission, and which involves the construction of a dam entirely within the Province of New Brunswick, Canada, overflowing lands both in said province and in the State of Maine.

Mr. Harries: 74. The Government objects to this testimony on the ground that the testimony relative to the St. John's River is not sufficiently specific to afford a basis or qualification for comparison with the Lake of the Woods.

105.

Mr. Lewis: 75. Respondents further offer to prove by said witness that he knows of no reason why the flowage easements required for the Lake of the Woods reservoir could not be utilized and the storage capacity of said reservoir developed by private enterprise without governmental aid or cooperation other than such authorization as the Governments of the United States and Canada have extended and granted as a matter of common practice pursuant to the rules and regulations of the International Joint Commission and other authorities which have been mentioned. That he is of the opinion that said flowage easements and storage capacity could have been so utilized and developed by private enterprise.

Mr. Harries: 75. While the Government admits that the witness has no knowledge of the obstacles to utilization
121 of the storage capacity of the lake, the Government objects to evidence that this witness "knows of no reason why flowage easements required for the Lake of the Woods reservoir could not be utilized and the storage capacity of said reservoir developed by private enterprise" upon the ground that this lack of knowledge by the witness has no tendency to prove the practicability of such utilization and development; or that it enhanced market values of the shore lands; and further objects to the testimony as stating a conclusion for which no proper foundation has been laid.

The Court: The objection is sustained.

Mr. Lewis: Exception.

106.

Mr. Lewis: 76. Respondents further offer to prove by said witness that he has had extensive experience during the past seven years in buying and selling flowage rights and easements on his own account or on account of the companies in which he was interested or on account of clients whom he represented. That during said period he has been engaged in or directly connected with the appraisement, buying and selling of flowage easements and storage rights totalling in value and price in the neighborhood of ten million dollars. That during said period he has had extensive experience in connection with the sale, purchase and acquisition of flowage rights and easements without the intervention of the exercise of the right of eminent domain, and that in the greater part of such transactions with which he has been connected the right of eminent domain was not exercised. That the State

of Michigan, where he has had extensive experience in connection with such transactions, the right of eminent domain was not available to corporations or companies for the purpose of developing storage reservoirs or water power for a period of sixty years or more prior to the year 1928. That he knows of his own knowledge that there have been no
122 condemnations of flowage rights or easements in the State of Michigan by such corporations or companies for the past sixty years or more up to the present time, but that nevertheless during said period many large and important storage reservoirs have been created and developed by such corporations and companies in said state, involving the acquisition in connection with various single projects of many hundreds of separate easements belonging to separate and distinct property owners.

Mr. Harries: 76. The Government objects to this evidence upon the ground that it is irrelevant and immaterial and has no bearing upon the valuation of lands in the State of Minnesota bordering on international waters; and further objects to the testimony as stating conclusions of law.

The Court: The objection is sustained.

Mr. Lewis: Exception.

107.

Mr. Lewis: 77. Respondents further offer to prove by said witness that it is his opinion that it would have been entirely practicable and feasible to acquire the flowage rights and easements necessary to the formation of a storage reservoir such as has been formed in the Lake of the Woods up to contour 1064 by private enterprise and without invoking or resorting to the exercise of the right of eminent domain.

Mr. Harries: 77. The Government objects to this testimony upon the ground that it states a legal conclusion; that no foundation has been laid by stating the elements to be taken into account; and upon the ground that the evidence shows as a matter of law that it would not have been practicable or feasible for private enterprise to attempt to form a reservoir; and upon the ground that the opinion of the witness is immaterial inasmuch as the practical possibility of completing the enterprise was as a matter of law too remote to affect market values.

123 The Court: The objection is sustained.

Mr. Lewis: Exception.

108.

Mr. Lewis: 78. Respondents further offer to prove by said witness that there is no market value for flowage easements or for flowage or storage rights in the State of Minnesota and other northwestern states, within the usually accepted meaning of the term "market value". That the value of flowage easements and storage rights for storage reservoirs is determined as a matter of custom and practice by reference to the special facts and circumstances involved in each instance. That there is a certain custom and practice recognized and followed by hydraulic engineers and by appraisers, owners, and uses of flowage easements and storage rights, whereby the value of such easements and rights is determined. That he knows what said certain custom and practice is.

Mr. Harries: 78. The Government objects to the evidence in the first sentence of the foregoing paragraph upon the ground that it constitutes a conclusion of law; that no foundation has been laid for this testimony; that custom and practice cannot overcome a settled principle of law that damages in condemnation proceedings are to be measured by the difference in market value of the property affected by the condemnation.

The Court: The objection is sustained.

Mr. Lewis: Exception.

109.

Mr. Lewis: 79. Respondents further offer to prove by said witness that according to said custom and practice the value of flowage easements and storage rights for storage reservoirs is arrived at by the exercise of judgment by persons skilled and experienced therein, based upon engineering experience, taking into consideration the availability for use of such easements and storage rights, the relative proximity in point of time of such use, and the economic value
124 of such use.

Mr. Harries: 79. The Government objects to this evidence upon the ground that engineering experience is not a prerequisite to the determination of market value; that the economic value of a "use" is not the measure of damage in these condemnation proceedings; and that the foregoing testimony is immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

110.

Mr. Lewis: 80. Respondents further offer to prove by said witness that the value of flowage easements and storage rights may be appraised with much greater certainty where the reservoir of which such easements form a part has been actually formed and is in existence, and where the use thereof has actually been determined.

Mr. Harries: 80. To which the Government objects on the ground that the testimony is immaterial.

The Court: The objection is sustained.

Mr. Lewis: Exception.

111.

Mr. Lewis: 81. Respondents further offer to prove by said witness that he has made a thorough examination, inspection, and study extending over a period of three years of the Lake of the Woods and its principal drainage area of the dams, power plants and other works at the outlets of said lake and in the Winnipeg River, of the possible sites and power developments at said outlets and in said river, of the flow of waters into and out of said lake, of the storage reservoir formed in said lake, and of the operation and use of said storage reservoir. That through said exam-
125 ination, inspection, and study he has become familiar with and knows the uses of said storage reservoir which are immediately available and the possible uses to which the same may be put.

112.

Mr. Lewis: 82. Respondents further offer to prove by said witness that he has made an examination and appraisal of the lands upon which it is necessary to acquire a flowage easement up to contour 1064 for said storage reservoir and that he knows the fair value thereof. That he has made an examination and appraisal of the flowage easement sought to be acquired in these proceedings on the lands of Elias Olson, Harry Brewster, and Randor G. Karlson, up to contour 1064, as described in the petition herein, and that he knows what is the fair value of each of said easements, or what is sometimes referred to as the fair market value of said easements, considering that there is no actual general market for such easements, as the term "market" is commonly used.

113.

Mr. Lewis: 83. Respondents further offer to prove by said witness that the fair value of said flowage easements,

sometimes referred to as the fair market value, as previously stated, is as follows:

On the lands of Elias Olson, $11,200.

On the lands of Harry Brewster, $18,000.

On the lands of Randor G. Karlson, $12,200.

Mr. Harries: 83. The Government objects to the foregoing testimony upon the ground that no sufficient foundation has been laid, but that on the contrary the witness, in stating that there is no general market for the property he values, clearly shows that he is incompetent to testify as to market values, which alone constitute the measure of damages in this case. The Government further objects to the testimony of values by this witness upon the ground
125a that adaptability for flowage purposes could not, as a matter of law, have affected market values because of the practical impossibility of carrying out the project without the intervention of eminent domain and the formation of international agreements.

126 "The Government also objects to all of the proposed testimony of Gardner S. Williams and George C. Newton, and to each item thereof, upon each of the grounds stated immediately after the offer to prove previously made by means of the witnesses Gardner S. Williams and George C. Newton, and Adolph F. Meyer.

The Court: The objections will be sustained.

Mr. Lewis: I ask to have this document marked as Respondents' Exhibit Number 51.

(Document marked Respondents' Exhibit 51 for identification by the reporter.)

Mr. Lewis: Respondents offer to prove by the witness H. C. Habstritt the facts set forth in Respondents' Exhibit 51 and state to the Court that if Mr. Habstritt were permitted to testify he would testify to the facts set forth in said exhibit.

Mr. Harries: The Government objects to the admission of the evidence of the proposed testimony upon the grounds set forth in the typewritten sheets attached to the copy of the Exhibit just offered by the respondents, and I ask to have them marked as Government's Exhibit 109.

(Document marked Government's Exhibit 109 for identification by the reporter.)

114.

Mr. Lewis: 84. Respondents offer to prove by the witness Habstritt, duly sworn and on the stand ready to testify, that from 1905 to 1910 he was a resident of the Village of Baudette in Lake of the Woods County, Minnesota. That since 1910 he has been a resident of Roseau in the County of Roseau, Minnesota. That for the past fifteen years he has been engaged in the real estate business. That he is thoroughly acquainted with the transfers of real property made in Roseau County during said time.

115.

Mr. Lewis: 85. Respondents further offer to prove by said witness that he has never known or heard of a sale or transfer of a flowage easement on any of the lands in
127 Lake of the Woods or Roseau County.

Mr. Harries: 85. Objected to as immaterial; damage in condemnation proceedings are determined by taking the difference in value of the entire tract affected by an easement before and after the taking; and the absence of conveyance of easements as such, does not disprove a market on which damages in condemnation shall be based; besides, the record conclusively shows by certified copies of recorded instruments of conveyance of flowage rights, that transfers did, in fact, occur.

The Court: The objection is sustained.

Mr. Lewis: Exception.

116.

Mr. Lewis: 86. Respondents further offer to prove by said witness that he personally knows of and had personal connection with the sale and transfer of a number of tracts of land in Roseau County wherein the purchase was made solely because of the value and reputed value of the land in question for flowage and storage purposes on Lake of the Woods and wherein the seller of said land sold same because he was in financial distress and was forced so to do.

Mr. Harries: 86. To which the Government objects on the ground that the evidence is immaterial; that the witness has not shown himself competent to testify as to motive save by hearsay; and that the allegation that the sale was forced is not the best evidence.

The Court: The objection is sustained.

Mr. Lewis: Exception.

117.

Mr. Lewis: 87. Respondents further offer to prove by said witness that ever since 1905 it has been a matter of common report, reputation and conversation among the people generally residing in Lake of the Woods and Roseau Counties that the lands in the vicinity of the Lake of the Woods which were being flooded by the storage of
128 water in the Lake of the Woods was of high value for flowage and storage purposes, and that it was a matter of common report, reputation, and conversation among said people that said lands so flooded were more valuable for flowage and storage purposes than for any other use or purpose.

Mr. Harries: 87. The Government objects to the foregoing testimony of a higher "use value" on the ground that it is immaterial since as a matter of law the possibility of use for flowage could not be reflected in market values because of the impossibility of making such use of the lands by any means other than the means now invoked, i. e. by international treaty and eminent domain.

The Government also objects to all of the proposed testimony of H. C. Habstritt and to each item of evidence therein contained upon each of the grounds stated immediately after the offer to prove by means of the witness Adolph F. Meyer.

The Court: The objection is sustained.

Mr. Lewis: Exception.

Mr. Harries: May the record also show, Your Honor, that the Government objects to the offers to prove on the part of the respondents, as to each item thereof, upon the grounds that were stated at length to the Court at the opening of court on Tuesday morning, January 27th last.

The Court: Yes, the record may so show.

Mr. Harries: And, if the Court please, counsel for Canada has asked me to request leave of the Court to file, as a part of the objections to the receipt of this testimony, the brief which was handed to the Court at the time the question of reservoir values was first raised, and he asks that that appear in the record, probably at this point.

The Court: Well, the record may so show, then—he wants the record to show that objections were made
129 for the admission of this evidence, for the reasons stated in his brief?

Mr. Harries: Yes, Your Honor.

Mr. Lewis: And may the record show, Your Honor, that in each of these offers to prove, which respondents have made, that each fact recited in the typewritten form, or the offer to prove, which is reduced for convenience to typewriting,—that each fact is offered separately in connection with each one of the offers.

The Court: Yes, that will be the understanding.

The Court: Now, it is my understanding that the Government makes no point of the fact that each one of these witnesses was not called to the stand and sworn before the offer of proof was made?

Mr. Harries: No, your Honor.

130 118.

"Respondents' Offer to Prove

Gardner S. Williams and George C. Newton.

Mr. Lewis: Respondents offer to prove by the witness Gardner S. Williams and George C. Newton, that flowage rights and easements are the subject of purchase and conveyance in the State of Minnesota as separate and distinct units of property, and that such rights and easements not infrequently are rented as well as sold. That such flowage rights and easements have a recognized rental value, and that said rental is determined and arrived at in a manner similar to the process of negotiation whereby the fair value, or as sometimes stated the fair market value, of such flowage rights and easements is determined, as described in the foregoing offers to prove by said witnesses.

Mr. Harries: The Government objects to this testimony on the ground that it constitutes a conclusion of law; and is immaterial inasmuch as rental values are not the measure of damage in a condemnation proceeding; and as a matter of law could not have been reflected in the market value of the property affected by the easement.

119.

Mr. Lewis: Respondents further offer to prove that said method of arriving at the fair rental value of such flowage

rights and easements is the standard custom and practice usually and customarily followed and employed by persons who engage in the rental of said flowage easements. That said witnesses have had experience in the determination of such fair rental value, and are acquainted with the custom and practice by which said fair rental value is customarily agreed upon and determined.

Mr. Harries: The Government objects to this testimony on the ground that custom and practice in determining rental values of easements are not material and do not go to the measure of damage in this proceeding.

131 120.

Mr. Lewis: Respondents further offer to prove that what is the fair rental value of any given flowage right or easement must be determined by a consideration of all the factors and conditions affecting each particular tract or case, and that such consideration and the determination of what is the fair rental value based thereon, is a matter of expert opinion arrived at by the exercise of engineering and market and business experience.

Mr. Harries: Objected to as a conclusion of law and as immaterial.

121.

Mr. Lewis: Respondents further offer to prove by said witnesses Williams and Newton, that they are acquainted with the lands involved in these proceedings, and with the circumstances and facts which should be taken into consideration in determining the fair rental value of the flowage easement sought to be imposed on said lands.

Mr. Harries: Objected to as a conclusion of law.

122.

Mr. Lewis: That they have given careful study to all said facts and conditions, and that they have formed an opinion based upon their knowledge and experience as to what is the fair rental value of each of said easements.

123.

Mr. Lewis: Respondents further offer to prove by said witness Gardner S. Williams, that the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Elias A. Olson, described in the petition for said easement is $864.00.

Mr. Harries: To this evidence the Government objects on the ground that it is immaterial and not a proper measure of damage in this proceeding; and upon the further ground that rental value was not, and as a matter of law could not be reflected in the market value of the tracts affected by the imposition of the easement because the union of properties necessary was not so practicable that the possibility would affect the market price and such union would not have been practicable or have been attempted except by the intervention of eminent domain.

132

124.

Mr. Lewis: That the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Harry Brewster, described in the petition for said easement is $1064.00.

Mr. Harries: To which the Government objects on the same ground as last above noted.

125.

Mr. Lewis: That the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Randor G. Karlson, described in the petition for said easement is $752.00.

126.

Mr. Lewis: Respondents offer to prove by said witness George C. Newton, that the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Elias A. Olson, described in the petition for said easement is $896.00.

Mr. Harries: To which the government objects on the same ground as stated to the offer contained in paragraph 93.

127.

Mr. Lewis: That the fair annual rental value of the flowage easement which petitioner seeks to impose upon the lands of Harry Brewster, described in the petition for said easement is $1440.00.

Mr. Harries: Same objections as interposed to the offer in paragraph 93.

128.

Mr. Lewis: That the fair annual rental value of the flowage easement which petitioner seeks to impose upon the

lands of Randor G. Karlson; described in the petition for said easement is $976.00.

Mr. Harries: Same objections as interposed to the offer of proof made in paragraph 93.

133 The Government also objects to all of the proposed testimony of Gardner S. Williams and George C. Newton, and to each item thereof, upon each of the grounds stated immediately after the offer to prove previously made by means of the witnesses Gardner S. Williams and George C. Newton, and Adolph F. Meyer.

The Court: The objections will be sustained.

Mr. Lewis: Exception.

129.

That the court erred in refusing to give respondents' request for instructions to the jury numbered 1, as follows:

"The jury is instructed to return a verdict in favor of each respondent for the fair value of the flowage easement which petitioner is seeking to acquire on each of said respondents' land, as disclosed by the evidence.

"If the Court shall deny respondents' first request for instructions, then respondents respectfully request the Court to give the following instructions to the jury:"

130.

That the court erred in refusing to give respondents' request for instructions to the jury numbered 2, as follows:

"In computing the amount of compensation to which each respondent is entitled, you should award him such an amount as will justly compensate him for his property taken by petitioner in these condemnation proceedings. You should take into consideration all of the uses for which respondents' said property is suitable and to which you find from the evidence that his said property was adapted on May 4th, 1929, and determine which of said uses is the most valuable and base your award thereon."

131.

That the court erred in refusing to give respondents' request for instructions to the jury numbered 3, as follows:

"You are instructed that each respondent is entitled to your verdict for such an amount as will justly represent the fair value of his property for the most valuable use to
134 which it was plainly adaptable and available on May 4th, 1929."

132.

That the court erred in refusing to give respondents' request for instructions to the jury numbered 4, as follows:

"You are instructed that you should award each respondent such an amount as will justly compensate him for the fair value for flowage and storage purposes of so much of his property as petitioner seeks to acquire by these proceedings, provided you find that his property was suitable for flowage purposes and that such was its most valuable use."

133.

That the court erred in instructing the jury in the following language as set forth in the last paragraph on page 734 and ending on the top of page 735 of the reporter's transcript:

"The first question for you to determine with reference to each piece of property involved in this proceeding is this: what was the fair market value of this property under natural conditions on May 4, 1929, at the time the easement was imposed, taking into consideration the right of the Government to maintain the levels of the lake up to level 1059. The next question is, what was the fair market value of this same property on May 5th, with the easement imposed upon it. By deducting the value of the property after the easement was imposed, from its value before the easement was imposed, you reach the amount of damage, the amount which the Government ought to pay."

134.

That the court erred in instructing the jury in the following language as set forth on page 735 of the reporter's transcript:

"In computing the fair market value, both before and after the imposition of the easement, you will take
135 into consideration all of the uses for which the property was available on May 4, 1929, and May 5th, 1929, and determine what use it was most valuable for, and base your award thereon; but you will not make an award based on any claim for reservoir value. I have held that under the law the value of these lands could not be based upon the use of the lake and its shores for reservoir purposes. It is, as I understand it, conceded that the only other use for which these lands are suited, with the exception perhaps of Mr. Olson's tract, is for agricultural purposes, or purposes re-

lating to agriculture, so that it is for those purposes that you are to value these lands."

135.

That the court erred in instructing the jury in the following language as set forth on pages 736 and 737 of the reporter's transcript:

"As you understand, at the outset of this case perhaps the most controverted question was the question as to whether in determining the value of these lands, any added value could be accredited them because of the fact that they formed the boundaries or shores of what would be a very large reservoir, which would be used in part for the benefit of power companies on the Winnipeg River. I have held that as a matter of law, that question does not come into this case under all of the circumstances, so that you have absolutely nothing to do with it, and will not consider it in any way in your deliberations. * * * Consider this question as involving nothing except these particular lands, and ask yourselves what under the evidence was the fair value, the fair market value of each piece of property on May 4th, without the easement upon it, and taking into consideration the right of the Government to use the ordinary natural lake
136 bed up to level 1059 for flowage purposes, Then ask yourselves what the fair market value of these different tracts was after the imposition of the easement."

136.

The court erred in instructing the jury in the following language as set forth on page 738 of the reporter's transcript:

"but after all, what we are asking you for, is your best judgment as to what, under the law and the evidence, constitutes the damage done to these lands by the taking of the easement in question."

137.

That the court erred in instructing the jury in the following language as set forth on page 747 of the reporter's record:

"As I told you in my charge, the questions you are to decide are the questions of damages to the lands involved in this case, and those were to be determined by determining the fair market value of each tract, assuming the lake to be in its natural state on the 4th day of May, 1929, taking into consideration the right of the Government to maintain the lake

at a level of 1059 for navigation purposes, and then what the value of the same tract was on the 5th day of May, 1929, with the easement imposed. That is, you are to determine the fair market value of each tract, under natural conditions, on May 4th, without the easement, and to subtract the latter value from the former value, and in that way arrive at your damages.".

138.

That the court erred in ordering and entering judgment in favor of petitioner and against respondent-appellant Randor G. Karlson, that upon payment of the sum of $880.00, the United States of America as against respondent-appellant Randor G. Karlson and all persons interested in said lands shall become permanently vested with all the rights prayed for in its petition herein, as against said lands described in said petition.

137

139.

That the court erred in ordering and entering judgment in favor of petitioner and against respondent-appellant Harry Brewster, that upon payment of the sum of $900.00, the United States of America as against respondent-appellant Harry Brewster and all persons interested in said lands shall become permanently vested with all the rights prayed for in its petition herein, as against said lands described in said petition.

140.

That the court erred in ordering and entering judgment in favor of petitioner and against respondent-appellant Elias A. Olson, that upon payment of the sum of $490.00, the United States of America as against respondent-appellant Elias A. Olson and all persons interested in said lands shall become permanently vested with all the rights prayed for in its petition herein, as against said lands described in said petition.

141.

That the court erred in ordering and entering judgment in favor of said petitioner and against respondent-appellant Randor G. Karlson that upon payment of said sum of $880.00, the United States of America shall become permanently vested with the right to raise the water level in the Lake of the Woods to a maximum height of 1064 sea level datum, and to flood or otherwise affect said lands in such manner and to such extent as may be incidental to the raising of the level of the waters in said lake, as aforesaid.

142.

That the court erred in ordering and entering judgment in favor of said petitioner and against respondent-appellant Harry Brewster, that upon payment of said sum of $900.00, the United States of America shall become permanently vested with the right to raise the water level in the Lake of the Woods to a maximum height of 1064 sea level datum, and to flood or otherwise affect said lands in such manner and to such extent as may be incidental to the raising
138 of the level of the waters in said lake, as aforesaid.

143.

That the court erred in ordering and entering judgment in favor of said petitioner and against respondent-appellant, Elias A. Olson, that upon payment of said sum of $490.00, the United States of America shall become permanently vested with the right to raise the water level in the Lake of the Woods to a maximum height of 1064 sea level datum, and to flood or otherwise affect said lands in such manner and to such extent as may be incidental to the raising of the level of the waters in said lake, as aforesaid.

144.

That said judgments, and each of them, are against the manifest weight of the evidence.

145.

That said judgments, and each of them, are contrary to law.

That all of the errors herein mentioned were duly excepted to by respondents-appellants.

Wherefore, your said respondents-appellants pray that the decree and judgments of the District Court of the United States for the District of Minnesota, Sixth Division, entered and filed in said proceedings on February 13, 1931, may be reversed and vacated, and that respondents-appellants be granted a new trial of their said cause.

C. E. BERKMAN,
Chisholm, Minnesota.

JOHN H. HOUGEN,
Crookston, Minnesota.

LEWIS, HUNT & PALMER,
By I. K. Lewis,
Duluth, Minnesota.
Attorneys for Respondents-Appellants.

(Endorsed): Amended Assignment of Errors. Filed in U. S. Circuit Court of Appeals on June 30, 1931, E. E. Koch, Clerk.

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140 (Order of U. S. Circuit Court of Appeals Granting Leave to Elias A. Olson to Attach Appendix to Brief, etc.)

It having been made to appear to the Court that the evidence received and excluded, and the offers to prove which were excluded by the trial court on the trial of the above entitled action, and which are urged by respondents as error on said appeal, are very voluminous, and that said evidence and offers to prove, together with the court's rulings thereon are set forth and quoted verbatim both in the amended assignments of error and in the bill of exceptions in said appeal, and appellants, in the interest of convenience and economy, having made application to this court for leave to file as an appendix to their brief a printed quotation of such evidence, with the rulings of the court thereon, in lieu of including the same in the body of their brief, as required by Rule #24 of this court,

Now, Therefore, It Is Ordered, That if respondents shall file with the Clerk of this Court with their brief and as an appendix thereto twenty (20) copies of a paged
141 printed statement quoting such evidence and offers to prove, and the rulings of the court thereon as are urged by respondents on said appeal, and if respondents, whenever any one of the matters contained in such appendix is referred to in their brief, shall cite the page of such appendix and the page of the printed record where such matter is found, said filing of such appendix shall be regarded by the court as compliance with the fourth paragraph of said Rule #24 of this Court.

Dated at Minneapolis, Minnesota, this 3rd day of August, 1931.

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411 And thereafter the following proceedings were had in said causes in the Circuit Court of Appeals, viz.:

(Appearance of Counsel for Appellant in Cause No. 9279.)

United States Circuit Court of Appeals
Eighth Circuit.

Elias A. Olson, Appellant,
No. 9279. vs.
United States of America.

The Clerk will enter my appearance as Counsel for the Appellant.

I. K. LEWIS,
Duluth, Minn.

JOHN H. HOUGEN,
Crookston, Minn.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 13, 1933.

(Appearance of Counsel for Appellee in Cause No. 9279.)

The Clerk will enter my appearance as Counsel for the Appellee.

LEWIS L. DRILL,
U. S. Atty. Dist. of Minn. Post Office Bldg., St. Paul, Minn.

DONALD D. HARRIES,
Sp. Asst. U. S. Attorney, 1200 Alworth Bldg., Duluth, Minn.

D. N. LINDEMAN, Esq.,
U. S. Engineer Office, Canal Park, Duluth, Minn.

412 (Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 24, 1931.

(Appearance of Counsel for State of Minnesota in Cause No. 9279.)

The Clerk will enter my appearance as Counsel for the State of Minnesota.

HENRY N. BENSON,
CHESTER S. WILSON,
State Capitol, St. Paul, Minn.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 7, 1931.

(Appearance of Counsel for the Government of Canada in Cause No. 9279.)

The Clerk will enter my appearance as Counsel for the Government of Canada (appearing pursuant to the provisions of the Protocol Accompanying Convention to Regulate the Level of the Lake of the Woods; signed at Washington the 24th day of February, 1925).

JOHN E. READ.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 7, 1931.

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413 (Appearance of Counsel for Appellant in Cause No. 9280.)

United States Circuit Court of Appeals
Eighth Circuit.

Randor G. Karlson, Appellant,
No. 9280. vs.
United States of America.

The Clerk will enter my appearance as Counsel for the Appellant.

I. K. LEWIS,
Duluth, Minn.

JOHN H. HOUGEN,
Crookston, Minn.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 13, 1931.

(Appearance of Counsel for Appellee in Cause No. 9280.)

The Clerk will enter my appearance as Counsel for the Appellee.

LEWIS L. DRILL,
U. S. Atty. Dist. of Minn., Post Office Building, St. Paul, Minnesota.

DONALD D. HARRIES,
Special Assistant U. S. Atty. 1200 Alworth Bldg., Duluth, Minnesota.

D. N. LINDEMAN, Esq.,
U. S. Engineer Office, Canal Park, Duluth, Minnesota.

414 (Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 24, 1931.

(Appearance of Counsel for State of Minnesota in Cause No. 9280.)

The Clerk will enter my appearance as Counsel for the State of Minnesota.

HENRY N. BENSON,
CHESTER S. WILSON,
State Capitol, St. Paul, Minn.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 7, 1931.

(Appearance of Counsel for the Government of Canada in Cause No. 9280.)

The Clerk will enter my appearance as Counsel for the Government of Canada (appearing pursuant to the provisions of the Protocol Accompanying Convention to Regulate the Level of the Lake of the Woods; signed at Washington the 24th of February, 1925).

JOHN E. READ.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 7, 1931.

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415 (Appearance of Counsel for Appellant in Cause No. 9281.)

United States Circuit Court of Appeals
Eighth Circuit

Harry Brewster, Appellant,
No. 9281. vs.
United States of America.

The Clerk will enter my appearance as Counsel for the Appellant.

I. K. LEWIS,
Duluth, Minn.

JOHN H. HOUGEN,
Crookston, Minn.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 13, 1931.

(Appearance of Counsel for Appellee in Cause No. 9281.)

The Clerk will enter my appearance as Counsel for the Appellee.

LEWIS L. DRILL,
U. S. Dist. Atty., Dist. of Minn., Post Office Bldg., St. Paul, Minnesota.

DONALD D. HARRIES,
Special Asst. U. S. Atty., 1200 Alworth Bldg., Duluth, Minnesota.

D. N. LINDEMAN, Esq.,
U. S. Engineer Office, Canal Park, Duluth, Minnesota.

416 (Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 24, 1931.

(Appearance of Counsel for State of Minnesota in Cause No. 9281.)

The Clerk will enter my appearance as Counsel for the State of Minnesota.

HENRY N. BENSON,
CHESTER S. WILSON,
State Capitol, St. Paul, Minn.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 7, 1931.

(Appearance of Counsel for the Government of Canada in Cause No. 9281.)

The Clerk will enter my appearance as Counsel for the Government of Canada (appearing pursuant to the provisions of the Protocol Accompanying Convention to Regulate the Level of the Lake of the Woods; signed at Washington the 24th of February, 1925.)

JOHN E. READ.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 7, 1931.

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417 (Order of Argument in Causes No. 9279, 9280 and 9281.)

United States Circuit Court of Appeals
Eighth Circuit.

November Term, 1931.

Monday, December 7, 1931.

Elias A. Olson, Appellant,
No. 9279. vs.
United States of America.

Appeal from the District Court of the United States for the District of Minnesota.

Randor G. Karlson, Appellant,
No. 9280. vs.
United States of America.

Appeal from the District Court of the United States for the District of Minnesota.

and

Harry Brewster, Appellant,
No. 9281. vs.
United States of America.

Appeal from the District Court of the United States for the District of Minnesota.

These causes, Nos. 9279, 9280 and 9281, having been called for hearing in their regular order, upon application the Court granted one hour additional time for the oral argument. Argument was commenced by Mr. I. K. Lewis for the appellants, continued, by leave of Court, by Mr. Henry N. Benson and Mr. Chester S. Wilson in behalf of the State of Minnesota, by Mr. Donald D. Harries, Special Assistant United States Attorney, for the appellee, and the hour for adjournment having arrived further argument was postponed until tomorrow morning.

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418 (Order of Submission.)

November Term, 1931.

Tuesday, December 8, 1931.

These causes, Nos. 9279, 9280 and 9281, having been called for further hearing, argument was resumed by Mr.

Donald D. Harries, Special Assistant United States Attorney, for the appellee, continued by Mr. John E. Read, K. C., in behalf of the Government of Canada, by leave of Court first granted, and concluded by Mr. I. K. Lewis for the appellants.

Thereupon, these causes were submitted to the Court on the transcript of the record from said District Court, the brief of appellants in which counsel for the State of Minnesota have joined, the brief of appellee and the brief filed by leave in behalf of the Government of Canada.

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419 (Opinion in Causes 9279, 9280 and 9281.)

United States Circuit Court of Appeals
Eighth Circuit.

No. 9279.—MAY TERM, A. D. 1933.

Elias A. Olson,	Appellant,	Appeal from the District Court of the United States for the District of Minnesota.
vs.		
United States of America,	Appellee.	

No. 9280.—MAY TERM, A. D. 1933.

Randor G. Karlson,	Appellant,	Appeal from the District Court of the United States for the District of Minnesota.
vs.		
United States of America,	Appellee.	

No. 9281.—MAY TERM, A. D. 1933.

Harry Brewster,	Appellant,	Appeal from the District Court of the United States for the District of Minnesota.
vs.		
United States of America,	Appellee.	

Mr. I. K. Lewis (Mr. John H. Hougen, Mr. C. E. Berkman and Messrs. Lewis, Hunt & Palmer were with him on the brief), for appellants.

Mr. Henry N. Benson and Mr. Chester S. Wilson, for State of Minnesota.

Mr. Donald D. Harries, Special Assistant United States Attorney (Mr. Lewis L. Dull, United States Attorney, District of Minnesota, and Mr. D. N. Lindeman, Attorney for United States War Department, were with him on the brief); for appellee.

Mr. John E. Read, K. C. for the Government of Canada.

Before STONE and BOOTH, Circuit Judges, and WYMAN, District Judge.

STONE, Circuit Judge, delivered the opinion of the court.

These are three separate appeals by landowners from judgments awarding damages in a condemnation proceeding prosecuted by the United States against the lands of each.

These lands border the Lake of the Woods which is a large body of water partly in the State of Minnesota and partly in Canada. The surface area of the lake is approximately 1,500 square miles with its outlet, by the Winnipeg River, in Canada. There are natural water power sites along that river. In order to utilize and develop these power possibilities, it is necessary to regulate the outflow of the water from the lake so as to maintain a dependable, uniform rate of flow during all seasons. This regulation of outflow must be secured by dams by which the flow can be controlled. The effect of such a dam is to restrain the outflow, to use the lake as a sort of reservoir and to raise the natural level of the lake. A raised level overflows shore lands. The lands involved here are shore lands so affected and it is this character of damage or taking which is in question.

In 1898, the Keewatin Power Company (a Canadian corporation) constructed, for power purposes, such a control dam in Canada, near Kenora. It utilized the lake as a reservoir and caused an average rise in the lake level of about three feet with resulting invasion of the shore lands. This flooding of shore lands has intermittently continued since 1898 and is substantially the level to be maintained hereafter. No damages were paid for this overflowing of lands.

In 1909, a treaty was made between the United States and Great Britain "relating to boundary waters" (Jan. 11, 1909, 36 Stat. part 2, p. 2448). This treaty established an International Joint Commission which, within defined limits, was given jurisdiction over "all cases involving the use or obstruction or diversion of the waters" (Art. VIII of Treaty) covered by Articles III and IV of the Treaty and respecting which those two Articles required the approval of the Commission. This jurisdiction expressly included uses for power * * purposes" (Art. VIII). This Treaty was general and did not specifically mention the Lake of the Woods.

The Commission was organized and the Lake of the Woods situation was referred to it. The final report (May 18, 1917) of the Commission was submitted to the two Governments and resulted in the "Treaty and Protocol * * * to regulate the level of the Lake of the Woods" (July 17, 1925, 44 Stat. part 3, p. 2108). This Treaty provided that "the level of Lake of the Woods shall ordinarily be maintained between elevations 1056 and 1061.25 sea level datum, and between these two elevations the regulations shall be such as to ensure the highest continuous uniform discharge of water from the lake" (Art. IV). There were other provisions applying to exceptional water conditions. An International Lake of the Woods Control Board was established to secure maintenance of the levels provided in the Treaty. In Article VIII is a provision that "A flowage easement shall be permitted up to elevation 1064 sea level datum upon all lands bordering on Lake of the Woods in the United States, and the United States assumes all liability to the owners of such lands for the costs of such easement." Article IX provided:

"The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.

Each shall likewise assume responsibility for any damage or injury which may hereafter result to it or to its inhabitants from the regulation of the level of Lake of the Woods in the manner provided for in the present Convention."

To carry into effect this Convention of 1925, the Act of May 22, 1926 (44 Stat. part 2, p. 617) and an amendatory Act (Apr. 18, 1928, 45 Stat. 431) were passed. These two Acts provided that the Secretary of War should investigate and report to Congress on claims for damages caused, prior to acquisition of flowage easements under

this Act." The Secretary was required to acquire, by purchase or condemnation, "the flowage easements up to elevation one thousand and sixty-four sea level datum upon all lands in such State [Minnesota] bordering on the Lake of the Woods, Warroad River and Rainy River." Such condemnations were to be in accordance with the Act of August 1, 1888 (25 Stat. 357) and "with the constitutional provisions of the State of Minnesota, which provide that private property shall not be taken, destroyed, or damaged for public use without just compensation therefor first paid or secured."

Being unable to secure these flowage rights upon various tracts by purchase, a condemnation proceeding was instituted, which included lands owned by these appellants. Commissioners were appointed to assess damages to the several tracts sought to be condemned and reported damages as to each. Both the United States and each of these appellants appealed from the awards of the Commissioners. The appeals as to the tracts owned by these three appellants were, by agreement and order, consolidated for trial before a jury. From judgments of awards of damages as to the tracts owned by each of these appellants each of them has brought his separate appeal. They are consolidated for hearing and determination in this court.

But one main issue is involved in these appeals. It is raised in the record in various ways—by exclusion of evidence, refusal to charge and the charge to the jury. The issue is whether the use of these properties for flowage purposes is such a use as, under the circumstances here, can be considered as an element of that value for which compensation must be made. Appellants present their argument under three distinct points, each of which has the same purpose and effect—to allow compensation for this flowage use value.

Point I is that this reservoir or flowage easement was at the time of taking under this action and for years before had been an existing, established easement; that it was a "unit" of value of the land; that it was such "unit" alone which was taken and, therefore, that the *measure* of value for compensation should be the value of this taken unit and not the difference between the values of the entire tract before and after taking under this action. Point II is that, whatever *measure* of value (either the above unit or the above difference) be applied, the taking of this existing and established use is a proper element of value in damages and compensation because such use existed at, prior to and independent of this condemnation, is such as may be advantageously employed by others than this condemnor and is such as naturally would or actually has increased the market value of the

property. Point III is that the fair annual rental value of the flowage use is an element in compensation for taking of such use. All of these matters have been presented by counsel upon both sides with great ability and with commendable clearness and fairness. About all that could have been put before us, both for and against, has been presented and the Court has been materially aided thereby.

I.

The Unit Measure.

The brief of appellants reads: "Appellants urge that *compensation* for property taken, rather than *damage* to their remaining estate, be employed as the measure of their compensation, because it is more consistent with sound reasoning, and because it more clearly *points out* the error of the trial court"—that error being "the exclusion of all evidence of the most valuable use [flowage] which their property has served for thirty years and for which it is adaptable." The *discussion*, by appellants, of this urged measure of compensation may be helpful in scrutinizing the claimed erroneous action of the trial court by the vital inquiry under this "point" is whether "it is more consistent with sound reasoning" to employ this unit measure of value.

The reasoning of appellant is that the "orthodox method of assessing just compensation is to determine the value of the whole property before and after the taking and compute the difference"; that this method came into practice in condemnations of rights of way for roads or railroads under circumstances which did not require the taking of the entire property affected; that "a different rule obtains where the entire unit of property is taken"; that the unit rule applies "where the property taken is a separate unit or species of property, and is capable of being acquired and transferred independently of the land on which it may be located"; that "easements of all kinds are dealt with in the law as property, separate and distinct, just the same as any other item of property"; that the matter here dealt with is a "flowage easement"; that flowage rights and reservoirs are listed and valued for rate and taxation purposes, are sold and dealt in as separate units and conveyances thereof are recorded as such under the laws of Minnesota; that it is "good business and sound economics to treat storage reservoirs and flowage easements as separate units of property"; and that, as to this particular easement, it appears that it is a complete, existing unit of property and has been for thirty years, is being condemned for identically the same use it has served for that period, will be perpetually so used, the entire unit is taken and ap-

pellants have expressly waived all claim for damages to their remaining property.

In the examination of adjudicated cases, it is suggested that, as to some, there has been confusion and failure to distinguish "between *compensation for property taken* when it is all taken, and *damages to the remaining estate* when the property is not all taken." It is urged that here "all of the flowage rights, and all of the flowage property belonging to appellants is being taken, *and appellants have expressly waived all claims for damage to their remaining property;* also, that it is important to distinguish between easements long in existence and use before condemnation and easements brought into being by such proceedings."

"Sound reasoning", as employed here, must be understood, of course, in a legal sense. As to this, appellants properly admit that the "orthodox method of assessing just compensation is to determine the value of the whole property before and after the taking and compute the difference." However, they contend that "a different rule obtains where the entire unit of property is taken", that an entire unit of property is (in this sense) taken where it is "capable of being acquired and transferred independently of the land on which it may be located" and all of such unit is taken and that this easement is of that character.

It must be conceded that there are many kinds of easements which are capable of being acquired and transferred independently of the land on which they may be located. Also, that flowage easements are of that character. As to *all* of the flowage right (treated here as a "unit") being taken, the record does not support such assertion. It is clear that flowage rights are taken to the extent needed by this improvement but the record tends rather to support the view that there existed other flowage rights beyond (higher than) those taken—otherwise, why the provisions of the Treaty limiting the maximum flowage (Treaty and Protocol of February 24, 1925, Art. IV, VII, VIII, 44 Stat. 2108) and appointing a Control Board (Art. III, V) to supervise the water levels. At least it is certain there is no showing here that the maximum flowage level of this taking is the entire possible flowage level of the lands. Thus while it is not shown that all of the possible flowage rights of these lands are taken yet the situation is one of a flowage easement capable of separate acquisition and transfer. Does this situation bring this easement within a rule of separate unit valuation for condemnation purposes? Appellants cite *International Paper Co.* v. *United States,* 282 U. S. 399; *United States* v. *Cress,* 243 U. S. 316; *Carondelet Canal Co.* v. *Louisiana,* 233

U. S. 362, 388; *Adams* v. *C. B. & N. Ry. Co.*, 39 Minn. 286, 390, 39 N. W. 629; 1 Dunnell's Minn. Digest, Sec. 3057; 20 C. J. 593 and 20 C. J. 655. *International Paper Co.* v. *United States*, 282 U. S. 399, was a suit for damages by a lessee of water flowage right for the taking thereof. The only thing taken was the only thing owned by the plaintiff, to-wit, the right to water flowage under its lease. The "unit" was the subject of separate ownership by that plaintiff. *United States* v. *Cress* (also, *U. S.* v. *Kelly, et al.*), 243 U. S. 316, were cases for damages from flowage caused through water raised by dams. It was held (Cress case) that as to certain lands intermittently overflowed the taking constituted an easement (p. 329); that as to destruction of a ford and private right of way thereto recovery could be had therefor as damage *to the land to which it was appurtenant* (p. 329); that (Kelly case) the right to unobstructed flow away from a mill dam "is not a mere easement or appurtenance" and destruction of such right is "a taking of a part of the land" (p. 330). *Carondelet Canal & Navigation Co.* v. *Louisiana*, 233 U. S. 362, involved the question of impairment of a contract by State legislation. This depended upon whether a contract between the State and the Company provided for compensation by the State when it took over a canal and related works constructed and operated by the company for fifty years under the contract. No issue of eminent domain was involved. The expression in the opinion, intended by citation of appellants, is (p. 388):

"It may be that it did not own the canal, or the bayou or the old basin. Indeed, ownership of their soil was disclaimed at the bar. But, we repeat, there was valuable property which the statute contemplated could revert and could be compensated for. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312."

Here the entire property and *title* thereto was in the company, separate from the ownership of the land, and that entirety was the unit for which the company was entitled to compensation. *Adams* v. *C. B. & N. Ry. Co.*, 39 Minn. 286, 39 N. W. 629, was an action for damages to property through operation of a railway along the street in front. The holding was that plaintiff had an easement for light and air *to this lot* and, for deprivation thereof, he could recover damages *to the lot*. Dunnell's Digest, Sec. 3037, is a statement that "an easement is property and may be 'taken' within the meaning of the Constitution", citing the Adams case, *supra*. 20 C. J. 593, Section 83, and 655 Section 131 recognize easements appurtenant to land as property subject to eminent domain. The result of these citations is not to sustain the contention of appellants that where an easement is *cap-*

able of separate acquisition and transfer it is a unit for condemnation valuation purposes. The rule is that an easement is such unit only where, prior to condemnation, it has been severed *in ownership* from the fee (*International Paper Co.* v. *United States*, 282 U. S. 399). Even though the ownership of the easement has been severed from the ownership of the land upon which it is imposed, the easement is not such unit if it is appurtenant to—enjoyed in connection with—land of the owner of the easement. In such cases, the damage for taking is the injury to the land to which it is thus appurtenant (*United States* v. *Cress*, 243 U. S. 316, 329 (ford and right of way thereto); *United States* v. *Grizzard*, 219 U. S. 180, 185; *United States* v. *Welch*, 217 U. S. 333, 339). In the Welch case (p. 339) the Court said: "* * * the value of the easement cannot be ascertained without reference to the dominant estate to which it was attached." This criterion of separate ownership is further illustrated in *Sharp* v. *United States*, 191 U. S. 341, 351-356, where several entirely separate tracts were owned by the same person and one only was taken and in *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, where several different character of ownerships endeavored to combine in seeking damages to the tract. In the latter case (p. 195) the Court said:

"But the Constitution does not require a disregard of the mode of ownership of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land."

Application of the above established principle to the situation here must result in ruling this "Point I" against appellants because there is here neither separate ownership nor separate tract of land taken.

II.

Flowage Use.

Appellants' second and main contention is that the flowage use of their lands for power reservoir purposes is an element of value proper to be considered in determining the damage from this taking. They contend that the uses to which land taken may be applied are properly and always considered as elements of value; that this flowage use existed at the time of this taking and had for years prior thereto; that such is the most valuable use of the lands and that such use naturally tends to and actually has affected the market value of these lands. The position of the Government is that all of the above con-

siderations are overridden for the reasons that any influence of flowage use on the value of these lands was impossible because the union of the properties necessary to this improvement was impracticable save by international agreement and eminent domain; because of the impossibility of obtaining authority to regulate lake levels for power purposes; because control of the lake outlets was necessary for any enjoyment of this use for power purposes and possibility of acquiring such control was removed by appropriation thereof by the Canadian Government, since 1898, for navigation purposes; and because the right of flowage upon these lands had been reserved by the United States in the laws under which these lands were opened for entry.

In so far as is necessary for a determination of this matter, the law applicable thereto is as follows. The Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." "Compensation" means recompense or "equivalent" (*Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 326) to the owner and has no relation to advantage to the taker (*United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76; *McGovern* v. *N. Y.*, 229 U. S. 363, 371; *United States* v. *Grizzard*, 219 U. S. 180, 183; *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 343). "Just" means a fair money equivalent for what is taken—its fair money value. Where there is an actual current market value for things of the kind taken that, naturally, fixes the fair money value (*Davis* v. *Newton Coal Co.*, 267 U. S. 292, 301; *United States* v. *New River Collieries Co.*, 262 U. S. 341; *Vogelstein & Co.* v. *United States*, 262 U. S. 337). However, most condemnations are of real estate or of interests therein where conditions as to valuation are different (*Sharp* v. *United States*, 191 U. S. 341, 349-350) and no such actual market value exists. However, "market value" is still the standard (*De Laval Co.* v. *United States*, 284 U. S. 61, 72; *McCoy* v. *Union Elev. R. R. Co.*, 247 U. S. 354, 365; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 81; *United States* v. *Grizzard*, 219 U. S. 180, 183), but it must be determined otherwise than by current market prices. In such situations, the definition of market value is "the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy" (*De Laval Co.* v. *United States*, 284 U. S. 61; 73; *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106, 123). The time for which the value is determined is the time of taking (*De Laval Co.* v. *United States*, 284 U. S. 61, 72; *Phelps* v. *United States*, 274 U. S. 341, 344; *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106, 123, 125; *Vogelstein & Co.* v. *United States*, 262 U. S. 337; *Monongahela Nav.*

Co. v. *United States,* 148 U. S. 312, 341) and this is unaffected by an unlawful taking prior to and existing at the time of lawful taking (*Searl* v. *School District,* 133 U. S. 553). In using this defined standard no account is given to values or necessities peculiar to the seller (*Mitchell* v. *United States,* 267 U. S. 341, 344-345; *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312, 326), or the buyer (*United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 76; *McGovern* v. *N. Y.,* 229 U. S. 363, 371; *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195), but only such matters as would affect the ordinary seller and buyer in negotiating a fair price. In reality the result sought and reached is what the trier of fact finds is a fair sales value. To reach this result, such trier may consider all matters which would naturally influence agreement upon a price by sellers and buyers willing but not compelled to bargain. Obviously, the uses to which property may be put vitally affect its value. But "use" in this sense does not mean mere physical adaptability. A square block of firm land anywhere in the United States is physically adapted to support a towering office building but very few have any value for that purpose. It is *use adaptability* which concerns us. Since value is to be determined as of the time of taking, it is use adaptability apparent at that time. Since market value is the standard sought, it is use adaptability which would affect market value at the time of taking—that is, which would influence a seller and a buyer in arriving at a fair price then. The above considerations limit the uses which may be shown. Such uses include not only present use (*Phelps* v. *United States,* 274 U. S. 341, 344; *Mitchell* v. *United States,* 267 U. S. 341, 344-345; *Hanson Co.* v. *United States,* 261 U. S. 581, 590; *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312, 328-330) but other uses. The difficulty in many adjudicated cases has been to determine when potential uses may be shown. Since they must be such as would influence market value at the time of taking, the Supreme Court has ruled that they must be "probable * * within some reasonable time" (*Sharp* v. *United States,* 191 U. S. 341, 356-357) or "probably be desired and available for" (*United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 77) or "considerable enough to be a practical consideration and actually to influence prices" (*McGovern* v. *N. Y.,* 229 U. S. 363, 372), but cannot be such as are "speculative, remote, and not shown to be commercially practicable" (*United States* v. *Coronado Beach Co.,* 255 U. S. 472, 488) nor "too remote and speculative to have any legitimate effect upon valuation" (*McGovern* v. *N. Y.,* 229 U. S. 363, 372). Whether a potential use is such as may be shown within the above definition, naturally, depends largely upon the circumstances of each situation (*McGovern* v.

N. Y., 229 U. S. 363, 373) but one factor is "demand for the use" (*Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 328; *Kerr* v. *South Park Comm.*, 117 U. S. 379, 387). Also, and particularly pertinent to our case, where the use depends upon assembly of numerous tracts separately owned the probability of uniting or acquiring all of them necessary to the use is an important—maybe a controlling—consideration in determining whether the use is "too remote and speculative to have any legitimate effect upon the valuation" (*McGovern* v. *N. Y.*, 229 U. S. 363, 372 and see *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 80), and "In estimating that probability the power of effecting the change by eminent domain must be left out" (*McGovern* v. *N. Y.*, 229 U. S. 363, 372, and see *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 80-81). The things we deem material to bear in mind in the foregoing statement of the law are that existing uses influence values; that potential uses are not considered if they are remote and speculative; that they are remote and speculative if the use depends upon the union of numerous tracts, variously owned, and such union is improbable and that in determining such probability the power of eminent domain must be excluded.

With these matters in mind we turn to the facts here. Appellants press strongly the fact that this use at the time of and for years prior to the taking in this condemnation was an actual existing use. That is true. Was the use here of the character and within the proper intendment of the decisions or, outside of those decisions, is it logically to be regarded as a use which would influence market value of these lands. The decisions above cited as to actual use at the time of taking (and there are many others from various courts) all have to do with a use by the owner which would pass to a buyer of the land and of which the owner is deprived by the taking. The actual use here is through an unlawful trespass (*Secombe* v. *Railroad Co.*, 23 Wall. 108, 118.) This trespass established the physical adaptability of the lands for this flowage for power purposes. What effect had the establishment of such fact upon the sales value of the lands which would influence a seller and buyer of such at the time of this taking? For more than thirty years, these lands had borne the burden of this trespass to their detriment without hope of redress. There was no such hope because this trespass was occasioned by works erected in the outlet of the lake within a foreign territory by a foreign company acting under authority of the foreign government. During that entire time there could exist no value to the owner or to a prospective buyer in this use of flowage. It was a positive reducer of value. It rendered part of the land unfit for any purpose to the owner or such a buyer. Nor was there any hope of compensation for continued usage which

could possibly have added to the sales value of the land. It was a peculiar and unfortunate situation where the land owner was helpless. There was no demand for this use by anyone who would or could be made to compensate him therefor. It had been appropriated under circumstances which were beyond his power to remedy. Then there came a change. Opening the matter by the general Treaty of 1909, the Government sought to cure this unjust situation by the Convention of 1925. This it did by assuring the levels of the lake (the measure of intrusion upon the lands) and by voluntarily assuming to pay compensation therefor. It was not until the Convention of 1925 that there was any possibility of the landowner receiving *any* compensation for this taking of his land. Nor has there been before or since any possibility of any other demand for such use. In this situation (which existed at the time of this condemnation taking), it seems to us, justice to the landowner and to the public (1) would demand that this flowage use be excluded from estimation of sales value of the lands unless it can be seen that such use was properly an element of such value, irrespective of these actualities. In other words, if such use was properly an element of such value before this trespass then it continued to be such in spite thereof and should be taken into account—otherwise not. We think it should not be so regarded for the reasons following.

At the time of this taking by condemnation, the Lake of the Woods covered about 1,500 square miles. The shore line (main shore and islands) is estimated at 3,093 miles (United States 188, Canada 2,905) or 2,225 miles (United States 140, Canada 2,085). Lands affected by the condemnation flowage level comprise a great number of separate tracts variously owned. In Canada: 15,000 acres are owned by the Province of Ontario, 16,000 acres by the Dominion (in Manitoba), over thirty tracts are Indian reservations and there are 723 tracts privately owned. The Canadian public lands had been withdrawn from settlement some years with a view to this character of improvement. In the United States: the United States owned something less than 11,000 acres, the State of Minnesota owned one fair sized tract, 850 tracts were privately owned by about 775 owners with over 1,200 other persons having legal interests (mortgagees, etc.) therein. Added to the considerations of multiplicity of tracts and ownership, are the patent difficulties of successfully dealing with various governmental units and Indian tribes. To assemble all of this flowage affected land

(1). Compensation must be just not only to the landowner but to the public (Searl vs. School District, 133 U. S. 553, 562; Garrison vs. City of N. Y., 21 Wall. 196, 204) and all of the circumstances and elements at the time of taking must be considered (Brooks-Scanlon Corporation vs. United States, 265 U. S. 106, 123-124, 125-126).

would require acquisition of the rights of this great number of persons (including two Nations, one State, two Provinces, Indian Tribes and private persons) in this large number of separately and varrously owned tracts. We cannot think that such an eventuality held that degree of probability or possibility which could affect the value of these lands and be an influence or consideration affecting, in the slightest degree, the minds of sellers and buyers thereof in arriving at a fair price therefor. Such use is too remote and speculative to have such effect in fact and, therefore, can have none in law.

To this it may be said, that the rejected offer of proof was to show that prices had actually been so affected. That prices of these privately owned lands would be affected by the prospect of purchase or condemnation of the flowage rights under the Convention of 1925 is entirely probable and natural. Before that Convention, such a tract of land would be worth only its usage for agricultural or fishing purposes with the burden of the flowage actually there and the most which could be vaguely hoped for would be the removal of the flowage and the resultant use, for the above purposes, of the overflowed land. With the Convention came the certainty of compensation for the overflowed land. To the extent of this compensation, the value of the lands would be increased to the owner and, therefore, would be a factor in sales price thereof. Beyond this, there is no vestige of reason for an increase. Even if owners and buyers might actually have thought that this compensation would include an enhancement from use for flowage purposes, there was no justification in law for such view. Such thought could spring only from the Convention which had in mind this very improvement and values arising because of the particular improvement cannot be included in compensation (*McCoy* v. *Union Elev. R. Co.*, 247 U. S. 354, 366; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76, 77, 80; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 326; *Shoemaker* v. *United States*, 147 U. S. 282, 305; *Kerr* v. *South Park Comm.*, 117 U. S. 379, 386, 387). Also, this Convention clearly provided for accomplishment of acquisition through eminent domain and where the use is possible only through the exercise of that power, "it must be left out" (*McGovern* v. *N. Y.*, 229 U. S. 363, 372) in estimating the probability of such a use as affecting sales value and compensation. With no further examination of the difficulties urged by appellee, we think the trial court correctly excluded consideration of this flowage use as an element of value.

III.

Rental Value.

In view of what has been above determined as to "Point II", little need be said as to the contention of appellants that the annual rental

value of this flowage use was improperly denied consideration. This suit is not concerned with compensation for the use of flowage rights *prior* to the taking under this condemnation. That is a different situation under rules of law (*Secombe* v. *Railroad Co.*, 23 Wall. 108, 118; *Searl* v. *School District*, 133 U. S. 553, 564) and, under the Convention of 1925, Art. IX, is to be cared for by a separate and different method. The problem in this action is whether flowage use value is a proper element of sales-market-value to be considered in determining the compensation due the landowners. If (as we have above held) this use cannot be properly considered, it is obvious that we are not concerned with any method of estimating the value of such denied use. Annual rental value thereof has no other purpose either in fact or in the decisions cited by appellants.

CONCLUSION.

The judgments must be and are *Affirmed.*

Filed August 17, 1933.

BOOTH, Circuit Judge, dissenting.

With great reluctance I find myself unable to agree with the opinion of the majority of the Court. The main issue in the cases is thus clearly stated in the majority opinion:

"The issue is whether the use of these properties for flowage purposes is such a use as, under the circumstances here, can be considered as an element of that value for which compensation must be made."

Two incidental questions are discussed in the majority opinion. I shall pass them by, as I do not think they are of decisive importance.

The crucial question is, in my judgment, whether the use of the land for reservoir or flowage purposes is a proper element to be considered in determining the compensation to be made in the condemnation proceedings.

The majority opinion contains the following:

"Appellants press strongly the fact that this use at the time of and for years prior to the taking in this condemnation was an actual existing use. That is true. Was the use here of the character and within the proper intendment of the decisions or, outside of those decisions, is it logically to be regarded as a use which

would influence market value of these lands. The decisions above cited as to actual use at the time of taking (and there are many others from various courts, all have to do with a use by the owner which would pass to a buyer of the land and of which the owner is deprived by the taking. The actual use here is through an unlawful trespass (*Secombe* v. *Railroad Co.*, 23 Wall. 108, 118.) This trespass established the physical adaptability of the lands for this flowage for power purposes. What effect had the establishment of such fact upon the sales value of the lands which would influence a seller and buyer of such at the time of this taking? For more than thirty years, these lands had borne the burden of this trespass to their detriment without hope of redress. There was no such hope because this trespass was occasioned by works erected in the outlet of the lake within a foreign territory by a foreign company acting under authority of the foreign government. During that entire time there could exist no value to the owner or to a prospective buyer in this use of flowage. It was a positive reducer of value. It rendered part of the land unfit for any purpose to the owner or such a buyer. Nor was there any hope of compensation for continued usage which could possibly have added to the sales value of the land. It was a peculiar and unfortunate situation where the land owner was helpless. There was no demand for this use by anyone who would or could be made to compensate him therefor. It had been appropriated under circumstances which were beyond his power to remedy. Then there came a change. Opening the matter by the general Treaty of 1909, the Government sought to cure this unjust situation by the Convention of 1925. This it did by assuring the levels of the lake (the measure of intrusion upon the lands) and by voluntarily assuming to pay compensation therefor. It was not until the Convention of 1925 that there was any possibility of the land owner receiving *any* compensation for this taking of his land."

I cannot agree with some of the ultimate facts and legal conclusions contained in the foregoing statement of the situation, and cannot agree with the conclusions of the majority opinion that flowage use should be excluded from an estimation of sales value of the lands.

The situation, as I think the record discloses, at the time of the present condemnation proceedings in 1929 was substantially as follows:

(1) Both the building of the Rollerway dam in 1887 and the building of the Norman dam in 1895-98 had produced trespasses by

flowage upon the lands here involved. These trespasses were committed either by private parties or by private parties jointly with the Canadian government. They continued down to the time of the present condemnation proceedings. These trespasses are conceded in the majority opinion; and it is further conceded that these trespasses established the physical adaptability of the lands for flowage purposes.

The adaptability for flowage use may not be an element of value; but the adaptability when utilized for such flowage use may contribute to the land a very material element of value.

In the cases at bar we have the adaptability. We also have the utilization of the adaptability. Both are conceded.

(2) But it is argued in the majority opinion, if I understand it, that the utilization of the adaptability does not contribute to the land any element of value because the utilization was a trespass and there was no hope of recovery for the trespass. This, I think, is erroneous.

As early as 1895, complaints were made by the owners of lands in the United States bordering on the lake that their lands were being overflowed as the result of the dams mentioned. These complaints were made to the United States Government, but they were not brought to the attention of the Canadian Government. A fair inference from the record is that the reason for this inaction was not because the trespass which was being committed was one for which there was no redress, but because the United States Engineers were of the opinion that the flooding complained of was produced not by the dams mentioned, but by natural causes. In other words, the United States Engineers labored under a mistaken belief as to the correct location of the high water mark of the Lake of the Woods in its natural state. The complaints of the landowners, however, continued, and attorneys were employed, but it was not until the International Joint Commission made its final report on the Lake of the Woods in 1917 that it was conclusively proven that the landowners were right and the United States Engineers were wrong, and that the Rollerway dam and the Norman dam had raised the level of the lake several feet above its level in its natural state.

The fundamental fact upon which a claim for damages by reason of flowage must rest was thus established after about twenty-two years of trespass had elapsed.

This finding of the International Joint Commission did not create a cause of action in behalf of the landowners; it simply furnished proof of one of the facts to establish such cause of action.

The cause of action existed long prior to the Treaties of 1909 and of 1925; and the cause of action was of recognized value long before the condemnation proceedings were begun. This is shown by the record.

Article II of the Treaty of 1909 (36 Stat. 2448, 2449) provides that "any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs".

The International Joint Commission also recognized the value of the flowage use. In its report it said:

"Maintaining the lake at a low level is clearly uneconomical, even from the viewpoint of the agricultural interests; and when the other interests involved are considered, it becomes appparent that, looking to the uses that will procure the best results, riparian lands are more valuable for flowage purposes than for agricultural purposes."

Article IX of the treaty of 1925 (44 Stat. 2108, 2110) recognized that the cause of action for trespass by past overflow was not of chimerical value. That Article provided:

"The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom."

Article X of said treaty provided (p. 2111):

"The Governments of the United States and Canada shall each be released from responsibility for any claims or expenses arising in the territory of the other in connection with the matters provided for in Articles VII, VIII, and IX."

And the Act to carry into effect the provisions of the treaty of 1925 (44 Stat. 617) contained the following:

"Sec. 3. The Secretary of War is hereby authorized and directed to cause to be investigated, as soon as practicable, all claims for damages caused, prior to the acquisition of flowage easements under this Act, to the inhabitants of the United States by fluctuation of the water levels of the Lake of the Woods due to artificial obstructions in outlets of said lake, and after due notice and opportunity for hearing, shall ascertain and determine the loss or injury, if any, that may have been sustained by the respective claimants and to report to Congress for its consideration the amount or amounts he may find to be equitably due such claimants * * *."

It is thus apparent that a flowage use value of the lands in controversy existed long prior to the treaty of 1925, and that such flowage use value was finally recognized by both the United States and the Canadian Governments; and that such flowage use value was actual and not chimerical and that it existed prior to and independently of any condemnation proceedings.

(3) Nor was the situation of the landowner as to recovery of such flowage use value as damages from the trespassers one of mere hopeless speculation. Were this the case, it would be a reproach to both Governments concerned. On the contrary, it is, in my opinion, a reasonable and safe conclusion that once the facts were established, the landowner could get compensation in damages in the courts of Canada, if the trespass had been committed by private parties; and probably could obtain compensation by Petition of Right, if the flowage use had been taken by authority of the Canadian Government (See *Halsbury's Laws of England*, Vol. 1, p. 17, paragraphs 21, 22, 23 and 24; and Vol. 10, pp. 26-30; also Vol. 2 D. L. R. [1928], p. 625, annotation "Petition of Right" by Arthur S. Bourinot); and certainly he could obtain redress through diplomatic action between the two Governments.

Such, substantially, was the situation, in my judgment, when the present condemnation proceedings were brought.

The amendatory Act of Congress for carrying into effect the provisions of the treaty of 1925 (45 Stat. 431) provides that condemnation proceedings shall be "in accordance with the constitutional provisions of the State of Minnesota".

Section 13 of Article I of the Constitution of the State of Minnesota provides:

"*Private property for public use*—Private Property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured."

What constitutes "private property" within the meaning of the State Constitution has been passed upon many times by the Minnesota State Supreme Court.

In *Adams* v. *Chicago, Burlington & Northern R. Co.,* 39 Minn. 286, 39 N. W. 629, the Court, in discussing the constitutional provision, said (p. 290):

"All property, whatever its character, comes within its protection. It is hardly necessary to say that any right or interest in land in the nature of an easement is property, as much so as a lien upon it by mortgage, judgment, or under mechanic's lien laws. If a man is deprived of his property for the purpose of any enterprise of public use, it must be a taking, even though the right of which he is deprived is not and cannot be employed in the public use."

This rule has been followed in numerous cases, among them: *Minneapolis, St. P., R. & D. Elec. T. Co.* v. *Searle,* 208 F. 122 (CCA 8); *Lamm* v. *Chicago, St. Paul, Mpls. & Omaha Ry. Co.,* 45 Minn. 71; *Gustafson* v. *Hamm,* 56 Minn. 334.

And the Courts of Minnesota have been liberal in admitting testimony as to the value of private property taken. *Duluth & Winnipeg R. Co.* v. *West,* 51 Minn. 163; *Cedar Rapids, etc., Ry. Co.* v. *Ryan,* 37 Minn. 38; *Russell* v. *St. Paul, Mpls. and Man. Ry. Co.,* 33 Minn. 210; *King* v. *Mpls. Union Ry. Co.,* 32 Minn. 224; *Sherman* v. *St. Paul, Mpls. & Man. Ry. Co.,* 30 Minn. 227; *Colvill* v. *St. Paul & Chicago Ry. Co.,* 19 Minn. 283; *Weaver* v. *Mississippi & Rum River Boom Co.,* 28 Minn. 534.

In the case last cited, the Court, speaking by Justice Mitchell, said:

"No principle is more fully implanted in American constitutional law than that private property shall not be taken for public use without compensation; and, in view of the fact that the government is granting so much of its prerogative franchise to private or *quasi* public corporations, in theory for public purposes, but often practically in part for private benefit, the exercise of which involves injury to, or the taking of, private property, there is no constitutional guaranty that requires to be more jealously guarded against encroachment than the one referred to."

In the Russell case the Court said (p. 213):

"Any existing facts which enter into the value of the land in the public and general estimation, and tending to influence the minds of sellers and buyers, may be considered."

The same liberal rule has been followed by the Supreme Court of the United States. The case of *Boom Co.* v. *Patterson*, 98 U. S. 403, is quite pertinent to the cases at bar. In the Patterson case a Boom Company sought to condemn three small islands in the Mississippi River so situated with reference to each other and the river bank as to be peculiarly adapted to form a boom a mile in length. The question in the case was whether their adaptability for that purpose gave the property a special value which might be considered. The Supreme Court held that the adaptability of the land for the purposes of a boom was an element which should be considered in estimating the value of the lands condemned, and the Court said, relative to the rule for estimating damages (p. 408):

"So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps imposssible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

The same liberal tendency in the admission of evidence in condemnation cases is shown in an exhaustive opinion by Judge Gardner of this Court in the recent case of *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, 65 F. (2d) 297.

It should be kept clearly in mind that the testimony sought to be introduced in the cases at bar, but excluded, was not offered for the purpose of obtaining damages for past trespass, but solely for the purpose of establishing an existing and established element of value of the land, to be considered by the jury in fixing the compensation for the acquirement of a flowage easement for the future; and, further, that the testimony sought to be introduced, but excluded, was not offered for the purpose of establishing a value of the flowage use which had come into existence by reason

of the commencement of the condemnation proceedings. The testimony was proffered for the purpose of establishing the value of a flowage use which had existed for many years and which value was claimed to be an important element in the total value of the particular land taken.

In addition to proof of the adaptability of the lands involved for flowage or reservoir use, and of the actual use of said lands for said purpose for many years, the landowners offered to prove that shore lands similar to those involved had been purchased long prior to the present condemnation proceedings because of their use for storage or reservoir purposes; and that larger prices were paid for such lands for that reason; that the conditions affecting the Lake of the Woods, and existent before the condemnation proceedings were commenced, were such as would naturally affect the market value and market price of shore lands; that the market value and market price of shore lands similar to those involved were in fact affected by their adaptability for use, coupled with actual use for flowage or reservoir purposes; that it was reasonably certain that the interests controlling the power projects below the outlet of the lake would seek to acquire flowage rights had not the treaty of 1925 been made; that there was competition between Ontario interests and Winnipeg interests in regard to the acquirement and control of the Lake of the Woods reservoir; that such flowage rights had a well-recognized rental value; and the amount of such rental value.

Deeds were offered, but excluded, which conveyed similar lands bordering on Lake of the Woods and which contained a reservation in the grantor of any right to past damages by reason of wrongful flowage of said lands.

All of the testimony along the lines mentioned and similar lines was excluded on the grounds that it was too speculative, did not go to the true measure of damages; and on various other similar grounds.

The Government contended, among other things, that before flowage or reservoir use of said shore lands could be an element of value of said lands, there would have to be a unification of the many titles to the shore lands and a control of the waters of said lake.

It seems to me that the question is one of fact whether the adaptability for reservoir or flowage purposes coupled with the long-

continued actual use for such purposes entered into the value of such lands or not. Whether such element of value would have been greater if the titles to the various parcels had been unified is not material; nor is it material whether or not there *should have been logically* no element of value in the lands based upon adaptability and use for reservoir purposes until the titles were unified. Unification of the titles may have been somewhat impracticable, but co-operation between the various owners including the United States and Canada (even by acquiescence) as to maintenance of lake levels was not impossible, but an established fact, even though the exact extent of the co-operation was not definitely fixed.

The question whether the adaptability, coupled with the actual use, did in fact enter into the value of the lands was, in my opinion, for the jury, and the question should have been submitted under proper instructions.

There is no point raised as to the sufficiency of the offers to prove; and the charge of the Court was explicit. It read:

"In computing the fair market value, both before and after the imposition of the easement, you will take into consideration all of the uses for which the property was available on May 4th, 1929, and May 5th, 1929, and determine what use it was most valuable for, and base your award thereon; but you will not make an award based on any claim for reservoir value. I have held that under the law the value of these lands could not be based upon the use of the lake and its shores for reservoir purposes. It is, as I understand it, conceded that the only other use for which these lands are suited, with the exception perhaps of Mr. Olson's tract, is for agricultural purposes, or purposes relating to agriculture, so that it is for those purposes that you are to value these lands."

The offers to prove, the rulings thereon, and the charge of the Court were all made pursuant to an agreement by Court and counsel that the crucial question should be raised and embodied in the record by offers to prove and by charge of the Court, as the clearest and most concise way of presenting the question to the appellate Court.

The rulings of the Court on the offers to prove and the charge of the Court were, it seems to me, contrary to the spirit, if not to the express provisions, of the treaty of 1925 and the Act of Congress for carrying it into effect.

The treaty provides (Article IX, *supra*):

"The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom."

The statute above quoted (44 Stat. 617) provides for an ascertainment of damages to the landowners by reason of flowage prior to the treaty.

The rulings of the Court on the offers to prove and the charge of the Court, however, held in effect that as a matter of law there could be no such damages.

The cases of *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *McGovern* v. *New York*, 229 U. S. 363; and *New York* v. *Sage*, 239 U. S. 57, relied upon by the appellee, lend support rather to the contentions of appellants in the cases at bar, when comparison is made between the facts disclosed in those cases and the facts disclosed in the cases at bar.

In the Chandler-Dunbar case, the Court said (p. 76):

"The exception taken to the inclusion as an element of value of the availability of these parcels of land for lock and canal purposes must be overruled. That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose." (Citing the case of *Boom Co.* v. *Patterson, supra.*)

In the McGovern case there had been no prior actual use of the land for a reservoir site (the purpose for which the land was being condemned) and the Court held that the landowner could not recover as damages for the taking of his land any part of the enhanced value thereof due to the condemnation proceeding.

In the Sage case there had been no prior actual use of the land for a reservoir site (the purpose for which the land was being condemned) and the Court followed the holding in the McGovern case.

In the cases at bar it was conceded that at the time of the condemnation proceedings and for many years prior, the lands sought to be taken had an actual, as distinguished from a potential use, for flowage or reservoir purposes; and the offers to prove tended to show that this actual use at the time of the condemnation proceedings and for years prior thereto had a value; and the offers to prove tended also to show that at the time of the condemnation proceedings and for years prior thereto this use value was an element entering into the value of the lands here involved.

For the reasons outlined above, I am of the opinion that the proffered evidence along the above mentioned lines should have been received, and that the charge of the Court, above quoted, was erroneous.

I think the judgments should be reversed.

Filed August 17, 1933.

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445 (Judgment in Cause No. 9279.)

United States Circuit Court of Appeals
Eighth Circuit.

May Term, 1933.

Monday, August 21, 1933.

Elias A. Olson, Appellant,
No. 9279. vs.
United States of America.

Appeal from the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

August 21, 1933.

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446 (Judgment in Cause No. 9280.)

United States Circuit Court of Appeals
Eighth Circuit.

May Term, 1933.

Monday, August 21, 1933.

Randor G. Karlson, Appellant,
No. 9280. vs.
United States of America.

Appeal from the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

August 21, 1933.

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447 (Judgment in Cause No. 9281.)

United States Circuit Court of Appeals
Eighth Circuit.

May Term, 1933.

Monday, August 21, 1933.

Harry Brewster, Appellant,
No. 9281. vs.
United States of America.

Appeal from the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

August 21, 1933.

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448 (Clerk's Certificate.)

United States Circuit Court of Appeals
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Minnesota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes in said Circuit Court of Appeals wherein Elias A. Olson was Appellant and the United States of America was Appellee, No. 9279, and wherein Randor G. Karlson was Appellant and the United States of America was Appellee, No. 9280, and wherein Harry Brewster was Appellant and the United States of America was Appellee, No. 9281, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twenty-second day of September, A. D. 1933, mandates were issued out of said Circuit Court of Appeals in each cause, directed to the Judges of the District Court of the United States for the District of Minnesota.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this tenth day of October, A. D. 1933.

E. E. KOCH,
Clerk, U. S. Circuit Court of Appeals for the Eighth Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 580

ORDER ALLOWING CERTIORARI—Filed December 11, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 581

ORDER ALLOWING CERTIORARI—Filed December 11, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 582

ORDER ALLOWING CERTIORARI—Filed December 11, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[redacted]

INDEX

	PAGE
Petition	1
Questions presented	2
Constitutional provisions involved	3
Treaties involved	3
Statutes involved	4
Statement	4
Established facts	5
Decision of Circuit Court of Appeals	8
Specifications of errors to be urged	8
Reasons for granting writ	9
Brief in support of petition	13
Rulings and opinions below	13
Jurisdiction	13
Questions presented, treaties and statutes involved, etc.	13
Argument:	14
I. The treaty of 1909 gave petitioners redress for the unlawful flooding of their land	14
Petitioners probably had redress under general law	16
II. The decision of the Circuit Court of Appeals excluding from consideration all evidence of value arising out of special use and adaptability conflicts with decisions of Circuit Courts of Appeal in other circuits and creates confusion in the law on the subject	17
III. The decision of the Circuit Court of Appeals not only is in conflict with the decisions of the same question in other circuits, but it is probably in conflict with *Boom Company v. Patterson*, 98 *U. S.* 403; *U. S. v. Chandler-Dunbar Company*, 229 *U. S.* 53, and other applicable decisions of this Court	20
IV. The decision of the Circuit Court of Appeals is contrary to the provisions of the Treaty of 1925, and Act of May 22nd, 1926	23

PAGE

V. The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions of the State of Minnesota 24

Conclusion 26

Appendix A (Pertinent provisions of the Treaty of 1909) 29

Appendix B (Pertinent provisions of the Treaty of 1925) 31

Appendix C (Pertinent provisions of the Act of May 22, 1926, as amended by Act of April 18, 1928) 34

Appendix D (Article I, section 13, Minnesota Constitution) 36

CITATIONS

Cases:

Adams v. C. B. & N. Ry. Co., 30 *Minn.* 286, 39 *N. W.* 629 25

Armendiaz v. Stillman, 54 *Tex.* 623 17

Boom Company v. Patterson, 98 *U. S.* 403 ..... 10, 11, 21, 25

City of New York v. Sage, 239 *U. S.* 57 ..... 11, 21, 22

Conan v. City of Ely, 91 *Minn.* 427, 97 *N. W.* 737 25

Cranstown v. Johnston, 3 *Ves.* 170, 30 *E.* 952 (1796) 16

Foot v. Edwards, 9 *Fed Cas. No.* 4908, 3 *Blatchf.* 310 16

Ford Hydro-Electric Co. v. Neely, 13 *Fed.* (2nd) 361 ..... 9, 17, 18, 19, 20

Kerr v. So. Park Commissioners, 117 *U. S.* 379 22

McGovern v. New York, 229 *U. S.* 363 21

Mercantile Investment Etc. Co. v. River Plate Etc. Co. L. R. (1892) 2 *Ch. Div.* 303 16

Mpls. St. P. R. & D. Elec. T. Co. v. Sedlre, 208 *Fed.* 122 25

Rickey Land & Cattle Co. v. Miller, 152, *Fed.* 11 16

Union Electric Light & Power Co. v. Snyder Estate Co., 65 *Fed.* (2nd) 297 20

U. S. v. Chandler-Dunbar Co., 229 *U. S.* 53 ..... 10, 11, 21

PAGE

Weiser Valley Land & Water Co. v. Ryan, 190 *Fed.* 417 ..... 9, 17, 19

Treaties:

Treaty of 1909 between United States and Great Britain, 36 Stat. Part II, page 2448 ..... 3, 14, 29

Treaty of 1925 between United States and Great Britain, 44 Stat. Part III, page 2108 ..... 4, 31

Constitutional Provisions:

United States Constitution, Fifth Amendment 3

Minnesota Constitution, Article I, Section 13 ..... 25, 36

Statutes:

Act of May 22, 1926, 44 Stat. Part II, page 617 ..... 4, 34

Act of April 18, 1928, 45 Stat. Part I, page 431 ..... 4, 24, 34

Miscellaneous:

Note 42 A. L. R. 210 17

7 R. C. L. Sec. 99, page 1062 17

In the Supreme Court

of the United States

OCTOBER TERM, 1933

ELIAS A. OLSON, PETITIONER,

vs.

UNITED STATES OF AMERICA.

RANDOR G. KARLSON, PETITIONER,

vs.

UNITED STATES OF AMERICA.

HARRY BREWSTER, PETITIONER,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

PETITION

I. K. Lewis, one of the attorneys for and on behalf of Elias A. Olson, Randor G. Karlson and Harry Brewster, petitioners, prays that a writ of certiorari issue to review the judgments of the Circuit Court of Appeals for the Eighth Circuit in the three cases above entitled between the above named parties, which judgments were entered on August 21st, 1933,

affirming the judgments of the United States District Court for the District of Minnesota. Said three cases were tried together.

QUESTIONS PRESENTED

THE FACTS ON WHICH THE FOLLOWING QUESTIONS ARE BASED ARE STATED UNDER THE HEADING "ESTABLISHED FACTS," INFRA.

THE PRINCIPAL QUESTIONS PRESENTED ARE:

1. Whether, by the *Treaty of* 1909 *between the United States and Great Britain with respect to the Dominion of Canada* "Relating to Boundary Waters," or under general law, the flooding of land in Minnesota bordering the Lake of the Woods, caused by interference with the outflow from said lake in the Dominion of Canada, gave to the owners of such land rights and remedies for redress on account of such flooding.

2. Whether, on the established facts, the special use and adaptability of petitioners' land for water storage and hydro-electric power purposes may be taken into consideration in determining the fair market value of such land, where it is established in the record that such special adaptability and use have been recognized for many years to be of such value that an international treaty was later entered into for the purpose of acquiring the same and enabling increased electric power to be developed in Canada on payment by the Canadian Government of $275,000.00, plus 50% of any additional cost of the flowage rights.

3. Whether, on the established facts, the fact that the

flowage easement is being acquired by eminent domain would, as a matter of law, exclude from consideration in determining fair market value the special adaptability and actual use of said land for reservoir and power purposes.

4. Whether, on the established facts, the exclusion of all evidence of special adaptability and use value of said lands for reservoir and power purposes in determining market value violated the *Fifth Amendment to the Constitution of the United States*, and *Article I, Section* 13, *of the Constitution of the State of Minnesota.*

5. Whether, on the established facts, the exclusion of all evidence of special adaptability and use value of said lands for reservoir and power purposes in determining market value was contrary to the spirit or the express provisions of the *Treaty of* 1925 *between the United States and Great Britain in respect of Canada*, and *Acts of Congress* for carrying it into effect.

CONSTITUTIONAL PROVISIONS INVOLVED

1. *Fifth Amendment to the Constitution of the United States.*

2. *Article I, Section* 13, *Constitution of the State of Minnesota.* (Appendix D).

TREATIES INVOLVED

1. *Treaty of* 1909 *between the United States and Great Britain with respect to the Dominion of Canada*, 36 *Stat. Part*

II, Page 2448. (The pertinent parts of said Treaty are set forth in Appendix A).

2. *Treaty of* 1925 *between the United States and Great Britain in respect of Canada*, 44 *Stat. Part III, Page* 2108. (The pertinent parts of said Treaty are set forth in Appendix B).

STATUTES INVOLVED

Act of May 22, 1926, 44 *Stat. Part II, page* 617, *as amended by Act of April* 18, 1928, 45 *Stat. Part I, Page* 431. (The pertinent parts of the Statute as amended are set forth in Appendix C).

STATEMENT

This proceeding originated in an action by the United States to condemn a perpetual flowage easement on lands in Minnesota bordering the Lake of the Woods. On appeal from the awards of Commissioners in condemnation, judgments were entered in the United States District Court for the District of Minnesota for compensation and damage in favor of petitioners herein, who appealed therefrom to the Circuit Court of Appeals, Eighth Circuit (R. 134-135, 281). Said appeals were consolidated and heard together on one record (R. 286).

On the trial in the District Court the principal question was the measure of compensation or damage (R. 22), Petitioners claimed the right to have the jury consider, among other things, the special adaptability of their land for reser-

voir purpose, and their actual use for such purpose for thirty years (R. 25, 26). The trial Court sustained the Government's objection to all evidence of such special adaptability and use, and on Government's motion required petitioners to submit their offers of proof in typewritten form, and sustained objections thereto, allowing an exception to each adverse ruling. This plan was adopted by the Court on Government's motion as the most simple and the clearest way to raise and squarely present the question of law as to the proper measure of damage and compensation (R. 26-27, 33-41, 437). The same question was raised by petitioners' requests for instructions to the jury (R. 125-126), and by the Court's charge to the jury (R. 130).

Petitioners' offers of proof and the evidence received establish the following facts without contradiction in the record:

ESTABLISHED FACTS

The Lake of the Woods is an international boundary lake between Minnesota and Canada, with an area of about 1500 square miles, and a main shore line in Minnesota of about 140 miles (R. 427). The outlet of the lake by the Winnipeg River is in Canada. There are valuable natural water-power sites along that river. To utilize and develop these power possibilities it has been found necessary to create a storage reservoir in the Lake of the Woods and to raise the natural level of the lake, with resultant flooding of its shore lands, of which petitioners' lands form a part (R. 417).

The Minnesota shore lands embraced within the storage

reservoir total several thousand acres, the title to which is variously held by several hundred private parties, municipalities, the State of Minnesota, and the United States. Canadian shore lands are similarly owned (R. 427).

The storage reservoir was created and its value demonstrated by the Norman Dam, built for hydro-electric power purposes by the Keewatin Power Company, a Canadian corporation, at Kenora, Ontario, in 1898. The storage reservoir has been maintained and used intermittently since that date (R. 22, 24). It has increased the power capacity of the Canadian hydro-electric plants in the Winnipeg River by about fifty per cent or approximately 200,000 continuous horse-power (R. 35, 50). Petitioners' lands have been flooded intermittently and used as a necessary part of this storage reservoir, without permission or compensation since 1898 (R. 22, 23).

The owners of said shore lands employed counsel and protested to the United States Government (R. 62, 74).

In 1909 a Treaty was entered into between the United States and Great Britain with respect to the Dominion of Canada to prevent and settle disputes regarding the use of boundary waters, and creating an International Joint Commission with jurisdiction and control over such waters (Appendix A).

In 1912 questions arising out of interference with the level of the Lake of the Woods and the flooding of its shore lands were referred to the International Joint Commission. Extensive studies were made, public hearings were held, and a report with recommendations was published and filed by

the International Joint Commission, in 1917. (Final Report of International Joint Commission).

In 1925 a Treaty was consummated between the United States and Great Britain in respect of Canada embodying and putting into effect the recommendations of the International Joint Commission that a flowage easement on Minnesota shore lands be acquired. (Appendix B).

Said Treaty was put into effect by Act of Congress May 22nd, 1926, amended by Act of Congress, April 18, 1928. (Appendix C).

Under the easement acquired pursuant to Treaty, said lands will continue to be subjected to practically the same use and burden as during the past thirty years (R. 22-23).

There was conflict of interest between the power interests and municipalities in the Province of Ontario and the power interests and municipalities in the Province of Manitoba. Such conflict was substantial and fundamental and caused competition and rivalry for the possession and control of said reservoir. Such competition existed prior to 1925. The value and importance of said storage reservoir was such that the one or the other of said competing interests would have acquired the necessary flowage easement if the Treaty of 1925 had not been entered into. It would have been entirely practicable for the one or the other of said competing interests to have acquired said flowage easement (R. 37, 38-40, 51-53, 78-80).

Because of the adaptability and actual use of said shore lands for reservoir purposes, and the general interest created

therein, their market value was increased and higher prices paid for them. (R. 58-59, 64-66, 68-69, 71-72, 105-106).

The greatest interest and activity in said lands were in 1919 or 1920, five or six years before the Treaty of 1925 was enacted (R. 124). Petitioners acquired their lands before 1925 (R. 94, 100, 169).

DECISION OF CIRCUIT COURT OF APPEALS

On appeal by petitioners from the judgments entered in the District Court on the jury's verdict, the said judgments were affirmed by the Circuit Court of Appeals, by a divided Court. The reasons are set forth in the majority opinion written by Judge Stone, Presiding Judge (R. 417). There was a dissenting opinion by Judge Booth, Circuit Judge (R. 429).

SPECIFICATIONS OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Treaty of 1909 between the United States and Great Britain in respect of Canada did not give petitioners redress for the unlawful flooding of their land.

2. In holding that petitioners had no remedy for the wrongful flooding of their lands.

3. In holding that the actual use of petitioners' lands for reservoir purposes could not be considered in determining market value.

4. In holding that the potential use and special adaptability of petitioners' lands were too remote and speculative to influence market value.

5. In holding that the exercise of eminent domain in acquiring the flowage easement necessarily excludes potential use value from consideration in determining fair market value.

6. In affirming the judgments of the District Court.

REASONS FOR GRANTING WRIT

1. The decision of the Circuit Court of Appeals in holding that the availability of petitioners' lands for the development of water-power, and the value of it for such purpose, must be excluded from consideration in determining its market value, is in conflict with the decision of the Circuit Court of Appeals, Seventh Circuit, in *Ford Hydro-Electric Company v. Neely*, 13 *Fed.* (2*nd*) 361, and with the decision of the Circuit Court of Appeals, Ninth Circuit, in *Weiser Valley Land & Water Company v. Ryan*, 190 *Fed.* 417, in both of which cases evidence of special use and adaptability was received and submitted to the jury under proper instructions.

(See Argument Point II, infra.)

2. The decision of the Circuit Court of Appeals has construed the Treaty of 1909 in a manner prejudicial to the rights of American property owners, and contrary to the terms of the Treaty, and likely to cause international misunderstanding.

The Treaty of 1909 expressly gives petitioners redress for flooding of their land. The Circuit Court of Appeals held that the treaty gave no such remedy.

(See Argument Point I, infra.)

This is an important question of federal law affecting international rights and relationships, which, so far as we have found, has not been, but should be, settled by this Court.

3. The decision of the Circuit Court of Appeals in holding that the special adaptability and actual use of petitioners' land must be excluded from consideration in fixing market value is probably in conflict with *Boom Company v. Patterson*, 98 *U. S.* 403; *U. S. v. Chandler-Dunbar Company*, 229 *U. S.* 53, and other applicable decisions of this Court, where consideration of such special use and adaptability was held proper. The majority opinion of the Circuit Court of Appeals held:

> "We think the trial Court correctly excluded consideration of this flowage use as an element of value." (R. 428).

In *Boom Company v. Patterson, supra*, this Court said p. 408):

> "Compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

(See Argument Point III, infra.)

4. The decision of the Circuit Court of Appeals that the acquistion of the flowage easement and the special use of the land by the exercise of eminent domain, necessarily excludes special use and adaptability from consideration in estimating market value is probably in conflict with *Boom Company v. Patterson, supra; United States v. Chandler-Dunbar Company, supra; City of New York v. Sage*, 239 *U. S.* 57, and other applicable decisions of this court where it was held that availability of land for special uses must be taken into consideration in determining market value.

(See Argument Point III, infra.)

5. The decision of the Circuit Court of Appeals has decided an important question involving the Constitution and law of Minnesota in a manner conflicting with the decisions of the Supreme Court of that State bearing on the same question.

By Act of Congress these condemnation proceedings are conducted "in accordance with the constitutional provisions of the State of Minnesota." The Supreme Court of the State of Minnesota has held that under the constitution and laws of that State the special adaptability and use of land must be taken into consideration in determining market value, (See Argument, Infra) whereas, the Circuit Court of Appeals has excluded all such evidence from consideration in this case.

(See Argument Point V, infra.)

6. The decision of the Circuit Court of Appeals is probably contrary to the spirit and provisions of the *Treaty of* 1925 between the United States and Great Britain, and the

Acts of Congress giving effect thereto. (See dissenting opinion of Judge Booth, R. 437-439).

(See Argument Point IV, infra.)

7. Petitioners' lands form only a small part of the Lake of the Wood storage reservoir. There are more than 400 other appeals pending in the United States District Court, District of Minnesota, wherein the same questions are involved. The parties to said appeals are awaiting the final determination of these questions by this Court. Totals involved in said appeals amount to several hundreds of thousands of dollars. The measure of compensation in condemnation proceedings is a matter of wide public interest. The law governing that question has been confused and made uncertain by the decision of the Circuit Court of Appeals. Questions affecting treaties and international relationships are involved. The Constitution and law of the State of Minnesota have been misapplied. Accordingly, the final determination of these questions by this Court is important, not only to petitioners, but to the governments of Canada and the United States and to the citizens of both countries, generally.

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

I. K. LEWIS,

One of the attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION

RULINGS AND OPINIONS BELOW

The rulings of the Trial Court, Honorable John B. Sanborn, District Judge, presiding, excluding all evidence of and offers to prove the special adaptability and use of petitioners' lands appear at R. 27, 33-41 and subsequent pages. His order denying petitioners' requests for instructions to the jury appears at R. 125, 126. The Court's instruction to the jury excluding from consideration all evidence of special use and adaptability appears at R. 126, 130. Petitioners' exceptions to the charge appear at R. 132, 133.

The majority opinion of the Circuit Court of Appeals, (Stone and Booth, Circuit Judges, and Wyman, District Judge) the opinion being written by Judge Stone, Presiding Judge, appears at R. 417-429. The dissenting opinion by Judge Booth appears at R. 429-439. The opinions are not yet reported.

JURISDICTION

The judgments of the Circuit Court of Appeals in each of the three cases were entered August 21st, 1933, (R. 439, 440). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925, 28 U. S. C. A. Section 347 (a), page 359.

QUESTIONS PRESENTED, TREATIES AND STATUTES INVOLVED, ETC.

A statement of the facts, the questions presented, the treaties and statutes involved, assignments of errors relied

upon, and a statement of the case will be found in the petition, supra.

ARGUMENT

I.

THE TREATY OF 1909 GAVE PETITIONERS REDRESS FOR THE UNLAWFUL FLOODING OF THEIR LAND.

The Circuit Court of Appeals, admitting that Petitioners' land was under "an actual existing use" for water-power purposes prior to 1925, excludes such "actual existing use" from consideration in determining market value because it holds that such "actual existing use" since it resulted from a trespass, could be of no value to petitioners or their grantees for the reason that they could neither prevent nor recover damage for the trespass. The Circuit Court of Appeals said (R. ft. 426, 427):

> "For more than thirty years, these lands had borne the burden of this trespass to their detriment without hope of redress. There was no such hope because this trespass was occasioned by works erected in the outlet of the lake within a foreign territory by a foreign company acting under authority of the foreign government. During that entire time there could exist no value to the owner or to a prospective buyer in this use of flowage. It was a positive reducer of value. It rendered part of the land unfit for any purpose to the owner or such a buyer. Nor was there any hope of compensation for continued usage which could possibly have added to the sales value of the land. It was a pecular and unfortunate situation where the land owner was helpless."

Judge Booth dissenting from the majority opinion on this point with reference to petitioners' cause of action for the trespass and their right to enforce it, said: (R. 432)

> "The cause of action existed long prior to the Treaties of 1909 and of 1925; and the cause of action was of recognized value long before the condemnation proceedings were begun. This is shown by the record.
>
> "Article II of the Treaty of 1909 (36 Stat. 2448, 2449) provides that 'any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs'."
>
> "Nor was the situation of the landowner as to recovery of such flowage use value as damages from the trespassers one of mere hopeless speculation. Were this the case, it would be a reproach to both Governments concerned. On the contrary, it is in my opinion, a reasonable and safe conclusion that once the facts were established, the landowner could get compensation in damages in the courts of Canada, if the trespass had been committed by private parties; and probably could obtain compensation by Petition of Right, if the flowage use had been taken by authority of the Canadian Government; . . . and certainly he could obtain redress through diplomatic action between the two governments." (R. 433).

The decision of the Circuit Court of Appeals by a divided Court, has construed the *Treaty of* 1909 to mean that American property owners whose property is damaged on the American side because of interferences with boundary waters on the Canadian side of the boundary, have no right either to enjoin the trespass or to recover damage therefore.

That construction of the Treaty is necessary to the decision of the majority of the Court. No other reason is given for excluding from consideration the actual use value, which the Court has found to exist in fact.

Admittedly such a decision of a question of federal and international law is of great and far reaching importance. The *Treaty of* 1909 is not confined to the Lake of the Woods but applies generally to all boundary waters, between the United States and Canada.

PETITIONERS PROBABLY HAD REDRESS UNDER GENERAL LAW

Likewise the majority decision assumes to decide the rights of American property owners under general law.

As pointed out in the dissenting opinion of Judge Booth, the majority decision is in conflict with established principles of general law which probably afforded petitioners redress independently of the *Treaty of* 1909 (R. 433).

Rickey Land & Cattle Company v. Miller,
152 *Fed.* 11, *at* 15.

Foot v. Edwards,
9 *Fed. Cases* 358, 359, *Case No.* 4903.
3 *Blatchf.* 310.

Cranstown v. Johnston,
3 *Ves.* 170. 30 *E.* 952, (1796).

Mercantile Investment Etc. Co. v. River Plate Etc. Co.
L. R. (1892) 2 *Ch. Div.* 303.

Armendiaz v. Stillman,
54 Tex. 623, *at* 627.

7 *R. C. L. Section* 99, *page* 1062.

Note, 42 *A. L. R.* 210 *and*
cases therein cited.

But we do not here discuss the question on its merits. We urge only that the Circuit Court of Appeals by a divided Court has construed the Treaty of 1909, and in so doing has decided an important federal question, and has also decided a question of general law probably in conflict with the weight of authority. Its decision is of far-reaching importance in the harmonious relationship between the United States and the Dominion of Canada. The question should be finally determined by this court.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS EXCLUDING FROM CONSIDERATION ALL EVIDENCE OF VALUE ARISING OUT OF SPECIAL USE AND ADAPTABILITY CONFLICTS WITH DECISIONS OF CIRCUIT COURTS OF APPEAL IN OTHER CIRCUITS AND CREATES CONFUSION IN THE LAW ON THE SUBJECT.

The Circuit Court of Appeals' decision squarely conflicts with *Ford Hydro-Electric Company v. Neely*, 13 *Fed.* (2*nd*) 361, Seventh Circuit, and with *Weiser Valley Land & Water Company v. Ryan*, 190 *Fed.* 417, Ninth Circuit.

These three cases are identical in principle. Each arises out of condemnation of flowage rights. In each case the land

condemned was insufficient when taken alone to complete the project. It had to be unified with other lands. This unification was accomplished by eminent domain. In each case the question was whether evidence of special adaptability and use value may be considered in determining market value.

The Circuit Court of Appeals of the Seventh and Ninth Circuits concur in holding that such evidence is competent, while the Circuit Court of Appeals of the Eighth Circuit holds directly the opposite.

The Circuit Court of Appeals in the instant case held:

> "We think the trial Court correctly excluded consideration of this flowage use as an element of value." (R. 428).

The Circuit Court of Appeals of the Seventh Circuit in *Ford Hydro-Electric Company v. Neely, supra*, in holding evidence of special use and adaptability competent, stated (p. 362):

> "The objection made to the question asked, and now urged to the testimony given by both witnesses, goes to the competency of the evidence sought and brought out; that is, to the competency of evidence as to peculiar fitness of the land for particular purposes as an element in estimating its value. That this is proper evidence to be considered by the jury in determining the market value of the land has been often decided. . . . The evidence objected to threw light upon the availability of the land for water power purposes and the value of such element, as bearing upon what might be paid for it by one desiring to purchase it, and thus bore upon its market value. . . . The availability of the land for the development of water power, and the value of it for

such purposes, was a proper element to be considered by the jury in fixing its market value."

Application to this Court for a Writ of Certiorari to the Circuit Court of Appeals, Seventh Circuit, in *Ford Hydro-Electric Company v. Neely, supra,* denied: 273 U. S. 723.

The Circuit Court of Appeals of the Ninth Circuit in *Weiser Valley Land & Water Company v. Ryan,* 190 *Fed.* 417, in likewise holding such evidence of special adaptability and use competent, stated (p. 423):

> "In forming their estimates of value, the defendants were entitled to have the witnesses take into consideration the land 'for the most advantageous use to which it may be applied'. . . . All the uses to which the property is available, the more advantageous as well as the less advantageous, should be taken into view, and the general estimate of the market value should be deduced. . . ."

The foregoing language and holdings are in square conflict with the holding of the Circuit Court of Appeals in the instant case. The dissenting opinion of Judge Booth conforms with the holdings of the Circuit Courts of Appeal of the Seventh and Ninth Circuits. Judge Booth stated: (R. 437):

> "The question whether the adaptability, coupled with the actual use, did in fact enter into the value of the lands was, in my opinion, for the jury, and the question should have been submitted under proper instructions."

Such conflict between the Courts of different Circuits must result in confusion and injustice.

Such confusion has already occurred, and in the Eighth

Circuit. During the very time that the instant case was under consideration by the Circuit Court of Appeals three other Judges of the same Court decided substantially the same question in the opposite way.

Union Electric Light & Power Co. v. Snyder Estate Company,
65 *Fed.* (2*d*) 297.

On April 24, 1933, the Circuit Court of Appeals, Eighth Circuit, in the *Union Electric Case*, cited *Ford Hydro-Electric Company v. Neely, supra*, with approval, and stated, page 304:

> "Testimony as to the value of the property, based on its availability for water power development, was properly admissible as affecting its market value. *Ford Hydro-Electric Company v. Neely,* (*C. C. A. 7th*) 13 *Fed.* (2*d*) 361."

On August 17th, 1933, the Circuit Court of Appeals, Eighth Circuit, in the instant case held squarely to the contrary, and stated:

> "We think that the Trial Court correctly excluded consideration of this flowage use as an element of value." (R. 428).

Such conflict not only between the Circuit Courts of Appeal of the several Circuits, but between decisions of the same Court, should be adjusted. This can be rectified only by a final decision and restatement of the law by this Court.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS NOT ONLY

IS IN CONFLICT WITH THE DECISIONS OF THE SAME QUESTION IN OTHER CIRCUITS, BUT IT IS PROBABLY IN CONFLICT WITH BOOM COMPANY V. PATTERSON, 98 U. S. 403, U. S. *v.* CHANDLER-DUNBAR COMPANY, 229 U. S. 53, AND OTHER APPLICABLE DECISIONS OF THIS COURT.

The majority opinion of the Circuit Court of Appeals excludes from consideration all evidence of special use and adaptability and among other cases relies upon *McGovern v. New York*, 229 *U. S.* 363; *U. S. v. Chandler-Dunbar Company*, 229 *U. S.* 53.

The majority of the Circuit Court of Appeals decided that where the special use is possible only through the exercise of eminent domain it must be excluded from consideration in estimating value. This holding is in conflict with the decision of this Court in *U. S. v. Chandler-Dunbar Company, supra*, and *Boom Company v. Patterson, supra.*

McGovern v. New York, supra, and *New York v. Sage*, 239 *U. S.* 57, relied on by respondent below, do not hold that evidence of special use and adaptability is incompetent in determining market value as was held by the Circuit Court of Appeals in the instant case. What the *McGovern* and *Sage* cases hold is that the value of the land for some special use and adaptability may not be taken as the measure of just compensation in lieu of market value. The *McGovern* and *Sage* cases simply hold that market value, and not some special value which might be found in a peculiar use or adaptability, is the measure of just compensation. In the instant case the question was, What evidence is competent to prove market value? Obviously, the two questions involve entirely different considerations.

Indeed, the *McGovern case* refers to *U. S. v. Chandler-Dunbar, supra.* In the *Chandler-Dunbar case,* where a piece of land was being condemned for public purposes, this Court held it proper to take into consideration the peculiar adaptability of the land in determining its market value. This Court said (pp. 76-77):

> "That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional parallel canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, *it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose.*" (Italics ours.)

Likewise this Court said in *City of New York v. Sage, supra* (p. 61):

> "The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account *if the union of properties necessary is so practicable that the possibility would affect the market price.*" (Italics ours.)

The record in the instant case establishes, without contradiction, that the market price was actually affected and increased.

Kerr v. So. Park Commissioners, 117 *U. S.* 379, is relied upon in the majority decision (R. 428). It will be found

that the *Kerr case* does not support the Circuit Court of Appeals' decision. See pages 385, 387 of 117 U. S. See also *Boom Co. v. Patterson, supra.*

On this branch of the case the dissenting opinion of Judge Booth (R. 438) states:

> "The cases of *United States v. Chandler-Dunbar Co.*, 229 *U. S.* 53; *McGovern v. New York*, 229 *U. S.* 363; *and New York v. Sage*, 239 *U. S.* 57, relied upon by the appellee, lend support rather to the contentions of appellants in the cases at bar, when comparison is made between the facts disclosed in those cases and the facts disclosed in the cases at bar."

(See also Judge Booth's analysis of cases R. 438-439.)

We submit that the conflict between the Circuit Court of Appeals' decision and the decision of this court on the same question is fundamental and important. It should be rectified by a final determination of the question and a restatement of the law by this court.

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS CONTRARY TO THE PROVISIONS OF THE TREATY OF 1925, AND ACT OF MAY 22*nd*, 1926:

That the Circuit Court of Appeals' decision construes and gives effect to the Treaty and to the Act of Congress, and accordingly decides an important question of federal law involving the rights of many private citizens, as well as international relationships, will not be questioned. That the de-

cision is contrary to the spirit, if not to the express provisions, of said Treaty and Statute is demonstrated in the dissenting opinion of Judge Booth, as follows (R. 437, 438):

> "The rulings of the Court on the offers to prove and the charge of the Court were, it seems to me, contrary to the spirit, if not to the express provisions, of the treaty of 1925 and the Act of Congress for carrying it into effect.
>
> "The treaty provides (Article IX, supra):
> 'The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.'
>
> "The statute above quoted (44 Stat. 617) provides for an ascertainment of damages to the landowners by reason of flowage prior to the treaty.
>
> "The rulings of the Court on the offers to prove and the charge of the Court, however, held in effect that as a matter of law there could be no such damages." (Statute referred to by Judge Booth, Appendix C).

V.

THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS OF THE STATE OF MINNESOTA.

Act of April 18, 1928, 45 *Stat. Part. I, Page* 431, provides that these condemnation proceedings shall be

"in accordance with the constitutional provisions of the State of Minnesota."

Section 13 of Article I of the Constitution of the State of Minnesota provides that:

> "Private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured."

The easement here in question is such property.

Adams v. C. B. & N. Ry. Co.,
39 *Minn.* 286,
39 *N. W.* 629.

Mpls., St. P. R. & D. Elec. T. Co. v. Searle,
208 *Fed.* 122.

The Minnesota law conforms to the decision of this Court and holds that evidence of special use and adaptability is competent for consideration in determining market value.

Conan v. City of Ely,
91 *Minn.* 127,
97 *N. W.* 737.

In the *City of Ely case* the Minnesota Supreme Court quoted with approval from the opinion of this Court in *Boom Company v. Patterson, supra*, and added (p. 131):

> "In the same line this court has held that a person is entitled to the fair value of his property for any use to which it is adapted, and for which it is available, and for which it may be sold. He is entitled to the value of his property for any use to which it may be applied, and for which it would ordinarily sell in the market, whether that use be one to which it is presently applied, or some other to which it is adapted."

Clearly the Circuit Court of Appeals' decision conflicts with the local law of Minnesota.

CONCLUSION

Petitioners respectfully urge that the questions involved in these proceedings are all of general interest and of national and international consequence; that they should be reviewed and finally determined by this court for the following reasons:

1. That the Circuit Court of Appeals' decision conflicts with the decisions of Circuit Courts of Appeal in other Circuits; that confusion has resulted, and is certain to result, from such conflict. That it has decided an important question of local law contrary to the decisions of the Supreme Court of the State of Minnesota, and that it is in conflict with the decisions of this Court.

2. That the questions on which the Circuit Court of Appeals' decision is in conflict, as herein stated, are of far reaching importance in that the decision has caused, and will be certain further to cause, confusion in determining damage and just compensation for property taken by the exercise of eminent domain; that extensive public improvements are going forward throughout the country, and that the power of eminent domain is generally employed; that the questions involved in the Circuit Court of Appeal's decision are necessarily involved in practically every condemnation proceeding, and consequently effect the public interest vitally. That more than 400 other cases arising out of this same condemnation proceeding, involving several hundreds of thous-

ands of dollars in value, and the same identical questions, await final determination by this Court; that, until this Court determines said questions, the measure of just compensation in condemnation proceedings generally, wherever special use and adaptability are involved, will remain in the realm of confusion and uncertainty.

3. That the Circuit Court of Appeals' construction of the Treaties of 1909 and 1925, and the Acts of Congress with reference thereto, is erroneous and prejudicial and vitally affects, for all time, not only the relationship between the United States and Great Britain as regards their international boundary waters, but also the property rights of large numbers of citizens in both countries.

Questions of such far-reaching importance to the rights of many people, to the uniformity of judicial decisions, and to international cordiality, should be finally determined by this Court, by issuance of the Writ of Certiorari as prayed for in the petition.

Respectfully submitted,

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APPENDIX A

PERTINENT PARTS OF THE TREATY OF 1909 BETWEEN THE UNITED STATES AND GREAT BRITAIN WITH RESPECT TO THE DOMINION OF CANADA. 36 STAT. PART II, PAGE 2448.

"The United States of America and His Majesty the King of the United Kingdom of Great Britain . . . being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise, have resolved to conclude a treaty in furtherance of these ends . . ."

ARTICLE II.

"Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the

boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing, or to cases expressly covered by special agreement between the parties hereto. * * * *"

ARTICLE III.

"It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission." * * *

ARTICLE IV.

"The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the

boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission."
* * *

ARTICLE VIII.

"This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval of this Commission is required. * * *"

"In cases involving the elevation of the natural level of the waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters, or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby. * * *"

APPENDIX B

PERTINENT PARTS OF THE TREATY OF 1925 BETWEEN THE UNITED STATES AND GREAT BRITAIN WITH RESPECT TO THE DOMINION OF CANADA, 44 STAT., PART III, PAGE 2108.

"The United States of America and his Majesty the King of the United Kingdom of Great Britain * * *

"Desiring to regulate the level of Lake of the Woods in order to secure to the inhabitants of the United States and Canada the most advantageous use of the waters thereof and of the waters flowing into and from the Lake on each side of the boundary between the two countries, and

"Accepting as a basis of agreement the recommendations made by the International Joint Commission in its final report of May 18th, 1917, on the Reference concerning Lake of the Woods submitted to it by the Governments of the United States of America and Canada,

"Have resolved to conclude a Convention for that purpose. * * *"

ARTICLE VIII.

"A flowage easement shall be permitted up to elevation 1064 sea level datum upon all lands bordering on Lake of the Woods in the United States, and the United States assumes all liability to the owners of such lands for the costs of such easement. * * *"

ARTICLE IX.

"The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.

"Each shall likewise assume responsibility for any damage or injury which may hereafter result to it or to its inhabitants from the regulation of the level of Lake of the Woods in the manner provided for in the present Convention."

ARTICLE X.

"The Governments of the United States and Canada shall each be released from responsibility for any claims or expenses arising in the territory of the other in connection with the matters provided for in Articles VII, VIII, and IX.

"In consideration, however, of the undertakings of the United States as set forth in Article VIII, the Government of Canada shall pay to the Government of the United States the sum of two hundred and seventy-five thousand dollars ($275,000) in currency of the United States. Should this sum prove insufficient to cover the cost of such undertakings one-half of the excess of such cost over the said sum shall, if the expenditure be incurred within five years of the coming into force of the present Convention, be paid by the Government of Canada."

PERTINENT PARTS OF PROTOCOL ACCOMPANYING CONVENTION TO REGULATE THE LEVEL OF THE LAKE OF THE WOODS.

"2. Should it become necessary to set up a special tribunal to determine the cost of the acquisition of the flowage easement in the United States provided for in Article VIII of the Convention, the Government of Canada shall be afforded an opportunity to be represented thereon. Should the cost be

determined by means of the usual judicial procedure in the United States, the Government of Canada shall be given the privilege of representation by counsel in connection therewith."

APPENDIX C

PERTINENT PARTS OF THE ACT OF MAY 22, 1926, 44 STAT. PART II, PAGE 617, AS AMENDED BY ACT OF APRIL 18, 1928, 45 STAT. PART I, PAGE 431.

"That the Secretary of War be, and he is hereby, authorized and directed to acquire, as soon as practicable after the enactment of this act, by purchase or by condemnation, in accordance with the provisions of the Act entitled 'An Act to authorize condemnation of land for sites for public buildings, and for other purposes,' approved August 1, 1888, and in accordance with the constitutional provisions of the State of Minnesota which provide that private property shall not be taken, destroyed, or damaged for public use without just compensation therefor first paid or secured, the flowage easements up to elevation one thousand sixty-four sea-level datum upon all lands in such state bordering on the Lake of the Woods, Warroad River, and Rainy River, and such lands or interests therein as are necessary to provide for the protective works and measures in such state along the shores of the Lake of the Woods and the banks of the Warroad River and the Rainy River as specified in Article 8 of the Convention signed at Washington on the 24th day of February, 1925, between the Governments of the United States and Great Britain, providing for the regulation of the level of the Lake of the Woods.

"In proceeding by condemnation for acquiring such flowage easements on any tract of land any benefit to the remainder of the tract or the property thereon derived from such easement shall be considered and damages shall be awarded accordingly.

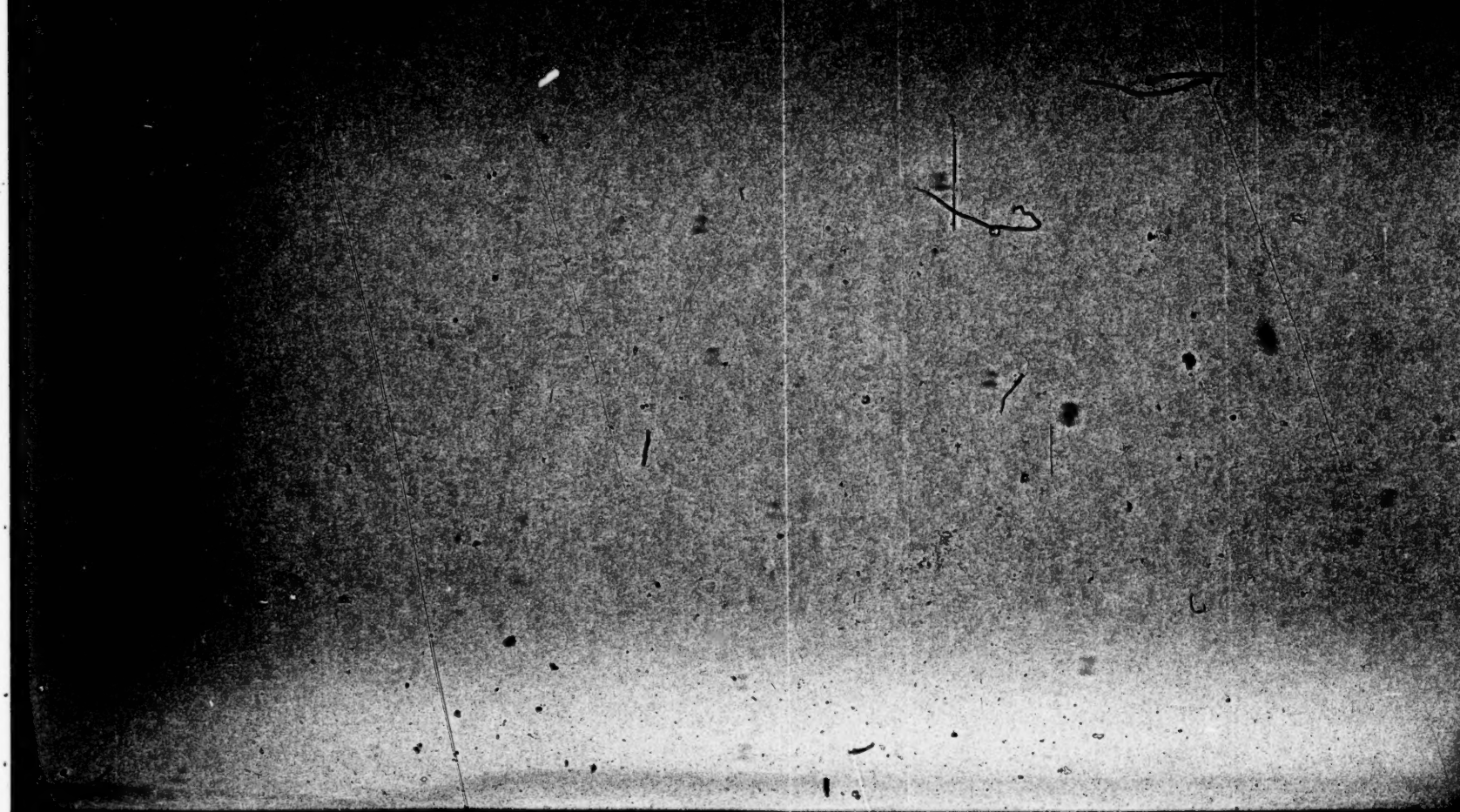
"Sec. 2. * * * All moneys which may be paid by the Government of Canada to the Government of the United States under Article 10 of the Convention are hereby appropriated and made available for expenditure by the Secretary of War for the construction of such works, and the carrying out of such measures, and for the acquisition of easements, lands, and interests therein, as provided in Section 1 of this Act. * * *

"Sec. 3 The Secretary of War is hereby authorized and directed to cause to be investigated, as soon as practicable, all claims for damages caused, prior to the acquisition of flowage easements under this Act, to the inhabitants of the United States by fluctuation of the water levels of the Lake of the Woods due to artificial obstructions in the outlets of said lake, and after due notice and opportunity for hearing, shall ascertain and determine the loss or injury, if any, that may have been sustained by the respective claimants and to report to Congress for its consideration the amount or amounts he may find to be equitably due such claimants, together with a statement in each case of the substantial facts upon which the conclusion is based. * * *"

APPENDIX D

ARTICLE I, SECTION 13, CONSTITUTION OF MINNESOTA

"Section 13. Private Property for Public Use—Private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured."



INDEX

PAGE

Questions presented 2

Statement 3

Government's criticism of Established Facts 5

Government's "Response to Petitioners' Points":

I. Consideration of Government's Response to Petitioners' Point I 7

A. Construction of Treaty of 1909 is essential to a decision herein 7

B. Treaty of 1909 confers right of redress for flowage 9

C. Treaty of 1909 establishes competency of evidence of reservoir values attributable to existing use as storage reservoir 11

D. International relationships between the United States and Canada not set at rest by Treaty of 1925 13

II. Conflict of decisions 14

Basic principle violated 14

Conclusion on conflict of decisions 17

III. Decisions below violate provisions and spirit of Treaty of 1925 and Act of May 22, 1926 18

IV. Decisions below conflict with local law of Minnesota 19

Conclusion 20

CITATIONS

Cases:

Conan v. City of Ely, 91 *Minn.* 127, 97 *N. W.* 737 19

Emmons v. Utilities Power Co., 82 *N. H.* 181, 141 *Atl.* 65 ..... 12, 16

New York v. Sage, 239 *U. S.* 57 17

U. S. v. Wheeler Township, 66 *Fed.* (2d) 977 4

Treaties:

Treaty of 1909 Between United States and Great Britain, 36 Stat. Part II, page 2448 ..... 7, 8, 9, 10, 11

Treaty of 1925 between United States and Great Britain, 44 Stat. Part III, page 2108 ..... 13, 18

Statutes:

Act of May 22, 1926, 44 Stat. Part II, page 617 18

In the Supreme Court

of the United States

OCTOBER TERM, 1933

ELIAS A. OLSON, PETITIONER

vs.

UNITED STATES OF AMERICA

RANDOR G. KARLSON, PETITIONER

vs.

UNITED STATES OF AMERICA

HARRY BREWSTER, PETITIONER

vs.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioners' Reply Brief

IN SUPPORT OF PETITION

Government's Brief In Opposition, largely, is a discussion on the merits of the questions involved in the litigation. Petitioners have not attempted to discuss the merits of these

issues. It is not appropriate to do so at this time; accordingly, this Reply Brief will be directed to so much of Government's Brief as bears on the importance of the questions presented in the record, and the necessity of a final determination of these questions on certiorari.

QUESTIONS PRESENTED

The Solicitor General's statement of the questions presented is inadequate. He states (Gov't. Br. p. 3):

> "The question presented therefore is essentially this: Was testimony of *potential utility* of petitioners' tracts of land to water power development, admissible as evidence of its value under the circumstances of this case?"

"*Potential utility* . . . to water power development" is only one of the elements. *Actual use* for water power development is even more to be considered. The Solicitor General's entire treatment of the questions involved practically ignores the fact that Petitioners' lands have been *actually used* for power purposes intermittently for thirty years.

Neither the trial court nor the Circuit Court of Appeals based its judgment exclusively on "*potential utility*." The Circuit Court of Appeals said:

> "The issue is whether *the use* of these properties for flowage purposes is such a use as . . . can be considered . . . " (R. 419).

FOOT NOTE—(Italics ours unless otherwise indicated.)

> "Appellants press strongly the fact that *this use* at the time of and for years prior to the taking in this condemnation *was an actual existing use. That is true* . . . is it logically to be regarded as a use which would influence market value of these lands?" (R. 426).

The Circuit Court of Appeals' decision of the main question, as stated, involves and is based upon the five questions stated in the petition, all of which are squarely presented to this court for final determination.

STATEMENT.

1. The Solicitor General's statement discloses that he has misunderstood petitioners' reason for offering to prove the *actual use* and peculiar adaptability of their land for storage and power purposes. He states (p. 6):

> "This testimony was proffered (R. 162) upon the theory that compensation should be made on the basis of 'reservoir values' of the shore lands."

It was petitioners' theory that the jury in awarding just compensation should consider

> "all of the uses for which respondents' said lands and property are suitable and to which you find from the evidence that his property was adapted on May 4, 1929, and determine which of said uses is the most valuable and base your award thereon." (Respondents' Request No. 2 for instructions to Jury, R. 125-6.)

It was Petitioners' theory that all uses, whether actual, or potential, should be considered, provided they are such as actually did, or probably would, influence market value.

It is important in this connection to correct the Solicitor General's misstatement of petitioners' offers to prove actual and potential use and their theory underlying such offers, for if the offers of proof were made on the theory stated by the Solicitor General, it might well be that the evidence would not be admissible, and as stated on page 3, Government's Brief,

> "If the evidence was rightly excluded no complaint could be made with reference to the charge."

2. The matters urged by the Solicitor General on pages 6, 7, Government's Brief, as well as the counterbalancing facts recited in the Petition pages 5-8, simply present issues of fact for the consideration of a jury and for the later consideration of the court in determining the merits of the questions presented. We refrain from discussing the merits.

3. The Government's contention that it had a right to flood lands in aid of navigation (Gov't. Brief p. 7) has been overruled in *U. S. v. Wheeler Township*, 66 *Fed.* (2d) 977, July 20, 1933.

4. At page 8 of its brief, the Government asserts that

> "The sole ground relied on by the court was that the possibility of assembling the numerous tracts requisite for use of the shores as parts of a reservoir was too remote and speculative to have any legitimate effect upon values . . ."

This statement is inaccurate for it ignores entirely that portion of the opinion which excludes all evidence of the *actual and existing use* of petitioners' lands for power and storage purposes, prior to and at the time of the commencement of these proceedings.

GOVERNMENT'S CRITICISM OF ESTABLISHED FACTS

1. At pages 9-11 of its brief, the Government attacks petitioners' statement of established facts, claiming that "it is not correct to say that the lands have been used for power storage during the past thirty years." This claim is based upon the assertion that the Canadian Government assumed control of the Norman Dam "for the express 'purpose of improving the navigation of said lake (of the Woods)'."

This is misleading. Under the agreement referred to by the Government (R. 237), a then existing *power dam* was to be *improved*. True, navigation was to be aided thereby, but there is nothing to indicate that the use of the dam for power purposes was abandoned. The statement that

> "it was not until 1926 (a year after the treaty permitting fluctuation of levels) that the Norman Dam was used for power purposes." (Gov't. Brief, pp. 9-10)

has no support in fact. The record is to the contrary. (R. 22-24.) The reservoir is primarily used for *power*, fishing and navigation. Government's Exhibit No. 64, (R. 236-238) contradicts the statement contained in Government's Brief. The very first duty of the Lake of the Woods Control Board as specified in Government's Exhibit 64 is

> "to see that all works and all *power canals* in the outlet from the lake . . . shall be so operated as to maintain the level of the lake as nearly as may be between 1056 and 1061 . . ."

It provides that the Board shall

> cause the works to be so operated as to furnish the largest dependable flow of water from the lake to secure navigation in the Winipeg River. *and to the advantage*

of the water powers of the Winipeg River . . . and other interests both on the lake and in the Winipeg River." (R. 238).

This Order in Council, Government's Exhibit 64, is dated January 21, 1919, seven years before 1926, the date on which the learned Solicitor General states the Norman Dam was first "used for power purposes". (Gov't Brief pp. 9-10.)

2. The suggested corrections, numbered "2" and "3" (Gov'ts. Brief, p. 10) have no justification in fact, but they are unimportant on the question now before the Court. Therefore we will not discuss them at this time.

3. Government's suggestions numbered "4" and "5" (Gov't. Brief, p. 11 and 12) and Government's "Argument" (Gov't. Brief, pp. 12-14) likewise arise out of an apparent misapprehension by the Government of the facts in the record. A comprehensive statement of these facts would not be appropriate here. They have no proper place in the question now before the Court. They deal with the merits of the questions in litigation.

However, the *fact* remains, and it can not be successfully contradicted, that there was competition for ownership and control of the shorelands and reservoir, and that market value was increased because of the actual use and adaptability of these shore lands for reservoir purposes. Whether or not this *competition*, and this *actual use and adaptability*, with their consequent *increase in market value* may be taken into consideration in awarding just compensation may not be argued now, for it goes to the very question which was decided by the Circuit Court of Appeals and which petitioners seek to have this Court review on certiorari.

CONSIDERATION OF GOVERNMENT'S "RESPONSE TO PETITIONERS' POINTS"

I.

A. CONSTRUCTION OF THE TREATY OF 1909 IS ESSENTIAL TO A DECISION HEREIN.

The Government asserts that the Treaty of 1909 is not involved and that it has not been construed by the Circuit Court of Appeals, and requires no construction by this Court. To sustain this contention reference is made to that part of Article II which provides that

> "this provision shall not apply to cases already existing . . ."

Thereupon, the *Government construes the treaty* as not applying to these proceedings by claiming that they are "cases already existing" within the meaning of the treaty.

The fallacy in Government's reasoning and position is obvious. To sustain its contention that the construction of the treaty is not involved and is not before this Court, the Government finds it necessary to *construe the treaty*, thereby proving that the Treaty of 1909 is involved. Government in its Brief may not construe the treaty and thereby remove it from final construction by this Court. Especially is this true since the construction placed upon the treaty by the Government is not the only possible construction and appears not to be the construction placed upon it in the dissenting opinion.

The phrase "cases already existing" is not to be brushed aside with a gesture as Government's Brief attempts to do. It regulates matters of importance to this country and to Canada.

The Treaty of 1909 applies generally to the entire boundary waters. Does the phrase mean cases pending in court? Does it mean cases lawfully existing? Is its application limited to cases of damage caused by diversion of water up to, but not after, the consummation of the treaty? Or does it include damage caused subsequent to the treaty? These questions must be answered and the treaty construed before it can be said that the Treaty of 1909 is not involved herein.

It is reasonable to construe the phrase "cases already existing" as applying to occasions or periods when there was "interference with" the boundary waters "*resulting in injury on the other side of the boundary.*" It is only such occasional interference that

> "shall give rise to the same rights and entitle the injured parties to . . . . legal remedies." (Art. II, Treaty of 1909, Appendix A, p. 29).

It is significant that from 1898 to 1909 inclusive there were five separate periods of time when the lake level was below 1059 sea level datum (R. 213, Gov't. Ex. 25). The ordinary high water mark to which the Government had a right to maintain the lake level was 1059. (R. 128-129). Accordingly there were no trespasses during these five separate periods of low water. Hence there were no "cases existing" for those periods.

The construction and maintenance of the Norman Dam was not a trespass. It gave rise to no cause for damage. But during the period from 1898 to 1909 inclusive there were a number of periods of high water which caused damage. Each period of high water gave a separate cause for damage. Each period of high water prior to the date of the Treaty of 1909

presented a "case already existing." Article II of the Treaty expressly provided that these "cases already existing" should not be affected by the treaty. It was the evident intention of the High Contracting Parties that the Treaty of 1909 should not "apply to cases already existing" and growing out of the periodic flooding of American lands. In other words the Treaty of 1909 was not intended to affect past claims. It was intended to establish future "rights" and obligations.

It is significant that the word "cases" was used in the Treaty, rather than conditions, or diversions, or interference, or some similar term. It is fair to infer that if a condition such as created by the Norman Dam on the Lake of the Woods were intended to be excluded from the future application of the treaty, it would have been easy to express it in appropriate and unambiguous language.

The fact that the dissenting opinion by Circuit Judge Booth makes no mention of the provision with reference to "cases already existing," and that Judge Booth uses the word *trespasses*, in the plural, (R. 430-431) indicates that Judge Booth was of the opinion that the Treaty of 1909 applies to the Lake of the Woods, that there were a number of "trespasses" before 1909, which were the "cases already existing" referred to in Article II of the Treaty.

At any rate, it cannot be doubted that the Treaty of 1909 was construed by the Circuit Court of Appeals, and that such construction was necessary to support its judgment.

B. THE TREATY OF 1909 CONFERS A RIGHT OF REDRESS FOR FLOWAGE.

The Government contends (pp. 16-18. brief) that if

the Treaty of 1909 is applicable to the cases here involved, it gave petitioners no right of redress for flowage. Here again the Government's contention involves a consideration of the merits of these cases. In passing, it may be noted that the Government's argument ignores certain important and controlling treaty provisions. They are as follows:

"ARTICLE IV.

The High Contracting Parties agree that except in cases provided for by special agreement between them, they will permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary *unless* the construction or maintenance thereof is *approved by the aforesaid International Joint Commission.*"

"ARTICLE VIII.

In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, *as a condition of its approval thereof*, that *suitable and adequate provision*, approved by it, *be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby*,".

The foregoing Articles of the Treaty constitute a contract between the two Nations for the benefit of their respective citizens. To permit the lake level to be raised without "adequate provision . . . . for the protection and indem-

nity . . . ." of petitioners would constitute a "breach of contract" which would entitle petitioners to redress in the Canadian Courts, under authority of the cases cited in Government's Brief, pp. 17-18, and under the theory suggested in the dissenting opinion of Circuit Judge Booth. (R. p. 433, par. 3).

In view of these provisions it is unreasonable to assume that the Treaty of 1909 gave no right of redress to petitioners.

At any rate, the matter was decided by the Circuit Court of Appeals. It is of international importance, and merits final determination by this Court.

C. THE TREATY OF 1909 ESTABLISHES THE COMPETENCY OF EVIDENCE OF RESERVOIR VALUES ATTRIBUTABLE TO EXISTING USES OF PETITIONER'S LANDS FOR A STORAGE RESERVOIR.

At page 18 of its Brief, the Government urges that even though the Treaty of 1909 conferred a right of redress for flowage, evidence of reservoir values "would be inadmissible in an action under the treaty for the reason that they were held inadmissible in this case; valuations based on reservoir utility of land would be speculative and conjectural, because the diversity of titles was such as to make unification out of the question."

This argument is unsound:

(a) Redress under the Treaty is redress for an *actual existing use* which does not involve potential unification of titles. By such actual use titles and property were unified in

fact. All the shore lands in question were actually being used as a unified reservoir. In dealing with redress or compensation for property as it actually is being used, the question of potential unification of titles is moot.

Emmons v. Utilities Power Co.
82 *N. H.* 181,
141 *Atl.* 65.

"A new situation has been created by the taking. *The condemnor has eliminated all uncertainty of effecting the combination of the properties.*"

(b) In the second place, the argument urged by the Government assumes as its premise, the correctness of the majority decision of the Circuit Court of Appeals in these cases. It assumes that petitioners' evidence of actual use and adaptability was properly excluded. That is one of the questions sought to be reviewed by this Court. This process of reasoning assumes the proposition to be proved. It assumes to determine the merits of these cases prior to, and as a basis for, determining whether or not this Court should review them in order to decide the merits.

The statement at top of page 19 of Government's Brief ignores the distinction between "*actual existing use*" and "*potential*" use.

The objection that the use is "remote and speculative" may be urged only against "*potential*" use. It may not be urged against "*actual existing*" use.

The only reason advanced by the majority decision against admitting evidence of "*actual existing*" use is that the Treaty of 1909 gave Petitioners no redress for such use being

made of their land. Petitioners believe that this was an improper construction of the Treaty.

D. INTERNATIONAL RELATIONSHIPS BETWEEN THE UNITED STATES AND CANADA HAVE NOT BEEN SET AT REST BY THE TREATY OF 1925.

At pages 19-20 of its brief, the Government urges that the decision of the Circuit Court of Appeals has no bearing on the relationship between the United States and Canada. Article IX of the Treaty of 1925 is cited as setting "at rest . . . . our relationships with Canada" under the Treaty of 1909. The Treaty of 1925 has no such effect, for the following reasons:

(a) The Treaty of 1909 applies generally to all boundary waters between Canada and the United States. The Lake of the Woods is nowhere mentioned. The Circuit Court of Appeals' decision is a general construction of that general treaty. It determines the rights of American property owners under the Treaty of 1909. The limitation on American rights so imposed by the Circuit Court of Appeals in this decision will hamper American citizens from the State of Maine to the State of Washington, and it will continue so to apply and hamper for all time, until corrected by this Court.

(b) The Treaty of 1925 not only does not "set at rest" the possibility of international differences arising out of the construction by this case, of the Treaty of 1909, but Article X of the Treaty of 1925 expressly provides for Canada's continued interest. Canada must pay 50% of the cost of the flow-

age easement, over and above the $275,000 which she has already paid. (Appendix B, p. 33).

Continuing international relationships are involved in the Circuit Court of Appeals' construction of both these treaties. Matters of such importance should be determined by this Court.

II.

CONFLICT OF DECISIONS

At pages 20-30 of its Brief, the Government attempts to reconcile the majority decision in the instant cases with the cases cited in the Petition and Brief, as conflicting therewith. A reply to Government's Argument would require a discussion, on the merits, of the questions presented for review. Such a discussion is inappropriate at this time.

The cases are before the Court. The conflict pointed out in the Petition and Supporting Brief is basic and fundamental. Government's ingenious attempt at reconciling the decisions can not remove the conflict. The following statements may assist in pointing out the conflict.

Basic Principle Violated.

The basic principle which runs through and supports the decisions cited in the Petition and Supporting Brief, as well as all other well considered decisions is:

Value, resulting from ACTUAL USE, *or from* SPECIAL ADAPTABILITY *for a useful purpose, may be proved and con-*

sidered in determining market value, provided:

(*a*) *That such* ACTUAL USE *existed at the time of, or prior to, condemnation, and independently thereof; or.*

(*b*) *That such* SPECIAL ADAPTABILITY *existed prior to and independently of the condemnation, and that such special adaptability is so considerable that a unification of the properties necessary to the useful purpose is reasonably probable and practicable. Eminent Domain as a means of unification need not be excluded where the other requisites are present.*

(*c*) *That such actual use, or such special adaptability has in fact affected the market value.*

In the instant cases all three requisites are present:

(a) The property has been *in actual use* as a storage reservoir for electric power ever since 1898, long before the condemnation proceedings were begun or thought of, and entirely independently of such proceedings.

(b) The *special adaptability* of the lands for storage reservoir purposes existed and was recognized before the Norman Dam was built in 1898. Otherwise the dam, which was built for electric power would not have been built (R. 24). The then existing special adaptability was entirely independent of these condemnation proceedings, and it was so considerable and conspicuous that both Governments took cognizance thereof. That unification of the properties was both probable and practicable was never questioned. The physical unification of the properties was completed as soon as the reservoir was filled following completion of the Norman Dam in 1898. No one questioned that unification of titles would follow.

The physical unification of the properties completely eliminated the question of unification of titles as an element of uncertainty.

> "A new situation has been created by the taking. The condemnor has eliminated all uncertainty of affecting the combination of the properties."
>
> *Emmons v. Utilities Power Co.*,
> 82 *N. H.* 181,
> 141 *Atl.* 65.

Petitioners offered to prove by the testimony of Mr. Adolph F. Meyer, consulting engineer for the International Joint Commission and hydro-electric engineer for the Keewatin Power Company, the builder of the Norman Dam, that there was substantial and fundamental conflict of interest between the electric power interests operating in the Province of Ontario and the electric power interests operating in the Province of Manitoba; that such conflict caused competition, between the Ontario interests and the Manitoba interests, to develop and control the Lake of the Woods storage reservoir. That the one or the other of said groups of power interests would have acquired flowage easements on Petitioners' lands, and other lands necessary to the formation of said storage reservoir, if the Governments had not co-operated to acquire such easement. That it would have been practicable for private interests to have acquired said flowage easement, and that it would have been accomplished by private enterprise (R. 37-40).

(c) The *actual use* of the land did in fact increase market value. The record is conclusive and uncontradicted on this point.

Likewise, the generally recognized *special adaptability* of these lands for power reservoir was such that market value naturally and probably would be and *actually was* increased thereby.

> "Any rise in value before the taking, not caused by the expectation of that event, is to be allowed. But, we repeat, it must be a rise in what a purchaser might be expected to give."
>
> *New York v. Sage,*
> 239 *U. S.* 57, 71.

Petitioners' Record shows that there was a "rise in value" and that higher prices were actually paid for these lands because of their use and adaptability. Such increase occurred, not only before condemnation but, many years before the Treaty of 1925 (R. 58, 59, 64-66, 68, 69, 71, 72, 94, 100, 105, 106, 169.)

Conclusion on Conflict of Decisions

Wherever the foregoing facts are present, the decisions of this Court hold that evidence of *actual use*, and evidence of *special adaptability* should be received and considered. The well considered decisions of the Circuit Courts of Appeal are to the same effect.

The majority decision of the Circuit Court of Appeals in the instant cases conflicts with the basic principle running through the cases cited:

(a) Because it excluded evidence of the *actual use* of the property.

(b) Because it excluded evidence of the *special adaptability* of the property for a useful purpose.

(c) Because these lands possess inherent value conferred by the fashioning of the Winnipeg River and the Lake of the Woods. Their value is not created by eminent domain. On the contrary, it was *their value*, inherent and widely recognized, that caused the Keewatin Power company to build the Norman Dam, and caused competition for possession and control of the shorelands and reservoir (R. 38-40).

(d) The decisions cited in the Petition and Supporting Brief hold that such value is the property of the owner of the land, and that it may not be taken without just compensation. The *majority decision takes this inherent value from Petitioners and gives it to the Power Companies without payment of just compensation.* In so doing the majority decision is in conflict with the decisions of this Court and of the decisions of the Circuit Courts of Appeal cited by Petitioners.

III.

THE DECISIONS BELOW VIOLATE THE PROVISIONS AND THE SPIRIT OF THE TREATY OF 1925 AND THE ACT OF MAY 22, 1926.

The Government next urges (Gov't. Br. pp. 30-32) that the majority decision of the Circuit Court of Appeals in no way runs counter to the Treaty of 1925 and the executing Act of May 22nd, 1926. It is said that perhaps "congress would be unlikely, in view of the present decision, to award past damages . . . ." This indicates that Government counsel mis-

apprehend the argument of dissenting Judge Booth on this point, found at page 24, Petitioners' Brief. That argument is not concerned with whether or not the instant decision will influence Congress one way or another in awarding past damages. That is immaterial. The argument is concerned with the rulings of the trial Court on the offers to prove the actual market value of shore lands as influenced by an actual existing user for a storage reservoir. This evidence was excluded. The Treaty of 1925 and the enacting statute contemplates such value, for they recognized damages caused by the past user of shore lands as a storage reservoir. Under the rulings of the trial Court excluding the offered evidence, it was "held in effect that as a matter of law there could be no such damages." The Treaty of 1925 and the enacting statute contemplated these damages; the trial Court and the Circuit Court of Appeals refused to recognize them.

IV.

THE INSTANT DECISIONS CONFLICT WITH THE LOCAL LAW OF MINNESOTA.

In response to Petitioners' Point V, the Government urges that the majority decision of the Circuit Court of Appeals does not conflict with the Minnesota decisions cited by Petitioners. This argument ignores entirely certain undisputed facts. The shore lands involved were actually used as storage reservoir at the time these proceedings were commenced. Values actually had increased because of such user. Shore lands not only "*would* ordinarily sell in the market" at this increased value (*Conan v. City of Ely*, 91 Minn. 127, 131; 97 N. W. 737), but in fact they *did* sell at such increased

values. This present increased value existed in fact. It was tangible and in many instances had been realized through sales.

CONCLUSION

Government's Brief In Opposition contains much argument on the merits of the questions presented for ultimate review and determination by this Court. Petitioners have endeavored to refrain from discussing the merits of these questions deeming it inappropriate to do so at this stage of the proceedings.

The questions urged for review involve questions of national and international importance and affect the rights and interests of large numbers of people. That these cases involve much more than the elementary principles suggested in Government's Brief is attested to by the exhaustive and painstaking opinions written by the majority and by the minority members of the Circuit Court of Appeals.

Petitioners urge the granting of Writs of Certiorari in order that the principal questions presented in their petition may be reviewed and finally determined by this Court, and for the reasons urged in their petition and supporting brief.

Respectfully submitted,

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In the Supreme Court

of the United States

OCTOBER TERM

1933

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HARRY BREWSTER, Petitioner

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Circuit Court of Appeals for the 8th Circuit.

Brief for Petitioners

INDEX

	Page
Rulings and opinions below	1
Jurisdiction	2
Questions presented	3
Constitutional provisions involved	4
Treaties involved	4
Statutes involved	4
Statement of the case	5
Condensed statement	5
Detailed statement	6
Specifications of error	14
Summary of argument	15
Claims of the parties	16
Argument and authorities	25
I. General rule	25
II. Reasons advanced for not applying general rule	26
(A) Actual use—reasons for excluding	26
(B) Potential use—special adaptability for—reasons for excluding	26
III. Discussion of reasons advanced	27
(A) Actual use	27
1. Examination of assumed facts	27
2. Examination of statement of law	43
(a) Treaty of 1909 gave Petitioners redress	43
(b) Petitioners had redress under general law	47
(B) Potential use—special adaptability for	52
1. Comparison of facts assumed with facts established	52
2. Examination of conclusions of law contained in majority opinion	57
IV. Conclusion from analysis of reasons advanced	76
V. Adaptation of general rule to special facts in measuring just compensation	79
(A) Land having no inherent adaptability for use for which it was taken	79
(B) Land having inherent adaptability for use for which taken	79
VI. Controlling principles determining consideration of special adaptability and use in estimating just compensation	90
English and Canadian Law	97

Page

VII. Multiplicity of ownerships, etc. do not exclude special adaptability and use from consideration 100

VIII. The judgments below were erroneous because they denied petitioners the right to recover the value of the flowage easement as separate unit of property 104

IX. The judgments below are contrary to spirit of Treaty of 1925 and the enabling legislation 117

Conclusion 117

Appendix A (Pertinent provisions of the Treaty of 1909) 120

Appendix B (Pertinent provisions of the Treaty of 1925) 122

Appendix C (Pertinent provisions of the Act of May 22, 1926, as amended by Act of April 18, 1928) 125

Appendix D (Article 1, section 13, Minnesota Constitution) 127

CITATIONS

Cases:

Adams v. C. B. & N. Ry. Co., 39 *Minn.* 286, 39 *N. W.* 629 110

Alloway v. Nashville, 88 *Tenn.* 512, 13 *S. W.* 123 ..... 23, 95

Armendiaz v. Stillman, 54 *Tex.* 623 50

Attorney General v. De Keysers Royal Hotel, Ltd., (1920) *A. C.* 508, 122 *L. T.* 691, 36 *T. L. R.* 600, 64 *Sol. Jo.* 513 ..... 51, 52

Boston Chamber of Commerce v. Boston, 217 *U. S.* 189 115

Brack v. Mayor, etc. of Baltimore, 125 *Md.* 378, 93 *Atl.* 994, *Ann. Cas.* 1916E 880 69

Brooks-Scanlon Corp. v. U. S., 265 *U. S.* 106 ..... 23, 91

Bulwer's Case, 4 *Coke* (*Part* 7) 49, 77 *English Reprint* 411 ..... 21, 50

Carondelet Canal Co. v. Louisiana, 233 *U. S.* 362 111

Cedar Rapids Mfg. & Power Co. v. La Coste, (1914) *App. Cas.* 569, 30 *T. L. R.* 293 97

C. G. Blake Co. v. U. S. 275 *Fed.* 861, *aff'd* 279 *Fed.* 71 ..... 67, 106, 108

City of Stockton v. Vote, 76 *Cal. App.* 369, 244 *Pac.* 609 96

Cochrane v. Commonwealth, 175 *Mass.* 299 96

Conan v. City of Ely, 91 *Minn.* 127, 97 *N. W.* 737 ..... 23, 25

Edwards v. City of Cheyenne, 19 *Wyo.* 110, 114 *Pac.* 677 ..... 24, 95

Emmons v. Utilities Power Co., 82 *N. H.* 181, 141 *Atl.* 65 ..... 23, 95, 103

Feathers v. The Queen, 6 *B. & S.* 257, 35 *L. J. Q. B.* 200, 12 *L. T.* 114, 122 *E. R.* 1191 52

Foot v. Edwards, 9 *Fed. Cas. No.* 4908, 3 *Blatchf.* 310 49

Page

Ford Hydro-Electric Co. v. Neely, 13 *Fed.* (2*d*) 361 ..... 23, 85

Gearhart v. Clear Spring Water Co., 202 *Pa. St.* 292, 51 *Atl.* 891 ..... 23, 94

In re Arbitration between Lucas & Chesterfield Gas & Water Board, 1 *L. R. K. B. D.* (1909) 16 98

In re Arbitration between the Mayor of Tynemouth & Duke of Northumberland, The Law Reporter, L. T. R. 89 *N. S., Sept.* 1903 *to Feb.* 1904, *p.* 557 100

In re Board of Water Supply of City of New York, 58 *Misc.* 581, 109 *N. Y. S.* 1036 70

In re Gilroy, 85 *Hun.* 424, 32 *N. Y. S.* 891 70

International Paper Co. v. U. S., 282 *U. S.* 399 111

Joint Highway District No. 9 *v. Ocean Shore R. R. Co.*, 128 *Cal. App.* 743, 18 *Pac.* (2*d*) 413 83

McCardle v. Indianapolis Water Co., 272 *U. S.* 400 111

McGovern v. New York, 229 *U. S.* 363 ..... 22, 65

Mannville Co. v. City of Worchester, 138 *Mass.* 89, 52 *Am. Rep.* 261 ..... 21, 50

Mississippi & Rum River Boom Co. v. Patterson, 98 *U. S.* 403 25

Monongahela Navigation Co. v. U. S., 148 *U. S.* 312 ..... 22, 87

National City Bank v. U. S. 275 *Fed.* 855 106

New York v. Sage, 239 *U. S.* 57 ..... 22, 63, 81

Niagara, Lockport & Ontario Power Co. v. Horton, 231 *App. Div.* 402, 247 *N. Y. S.* 761 ..... 23, 92

Olson v. U. S. (*C. C. A. 8th Cir.*) 67 *Fed.* (2*d*) 24 2

Rickey Land & Cattle Co v. Miller & Lux, (*C. C. A. 9th Cir.*) 152 *Fed.* 11 ..... 21, 49

Rundle v. Delaware & R. Canal Co., 21 *Fed. Cas. No.* 12139, 1 *Wall. Jr.* 276 49

San Diego Land & T. Co. v. Neale, 8 *Cal.* 50, 25 *Pac.* 977 95

Sanitary District of Chicago v. P. Ft. W. & C. Ry. Co., 216 *Ill.* 575, 75 *N. E.* 248 ..... 87, 89

San Joaquin & C. Co. v. County of Stanislaus, 233 *U. S.* 454 111

Sargent v. Merrimac, 196 *Mass.* 171, 81 *N. E.* 970, 11 *L. R. A.* (*N. S.*) 996 ..... 24, 72

Scott v. Brest, 2 *T. R.* (*Eng.*) 238 ..... 21, 50

Shoemaker v. U. S., 147 *U. S.* 282 ..... 22, 75

Simpson v. Shepard (*Minnesota Rate Cases*), 230 *U. S.* 352 ..... 22, 80

Smith v. Southern Ry. Co., 136 *Ky.* 162, 123 *S. W.* 678, 26 *L. R. A.* (*N. S.*) 927 50

Page

Southern Ry. Co. v. City of Memphis, 126 *Tenn.* 267, 148 *S. W.* 663, 41 *L. R. A.* (*N. S.*) 828, *Ann. Cas.* 1913*E* 153 88

Stillman v. White Rock Mfg. Co., 23 *Fed. Cas. No.* 13466, 3 *Woodf. & M.* 539 ..... 21, 49

Thayer v. Brooks, 17 *Ohio* 489, 49 *Am. Dec.* 474 50

Tobin v. The Queen, 16 *C. B. N. S.* 310, 33 *L. J. C. P.* 199, 10 *L. T.* 762, 143 *E. R.* 1148 52

Township of Beaverton v. Lord, 235 *Mich.* 261, 209 *N. W.* 122 111

Union Electric Light & Power Co. v. Snyder Estate Co., 65 *Fed.* (2*d*) 297 95

U. S. v. Boston, C. C. & N. Y. Canal Co., (*C. C. A. 1st Cir.*) 271 *Fed.* 877 95

U. S. v. Chandler-Dunbar Water Power Co., 229 *U. S.* 52 ..... 22, 75, 82, 87

U. S. v. Cress, 243 *U. S.* 316 111

U. S. v. New River Collieries Co., 262 *U. S.* 341 ..... 68, 106

Wadsworth v. Mfctrs. Water Co., 256 *Pa. St.* 106, 100 *Atl.* 577 94

Weiser Valley Land & Water Co. v. Ryan, (*C. C. A. 9th Cir.*) 190 *Fed.* 417 ..... 23, 92

Yates v. The King, 20 *Ex. C. R.* 175 51

Treaties:

Treaty of 1909 between United States and Great Britain, 36 Stat. Part II, page 2448 ..... 4, 7, 43, 120

Treaty of 1925 between United States and Great Britain, 44 Stat. Part III, page 2108 ..... 4, 8, 109, 122

Constitutional Provisions:

United States Constitution, Fifth Amendment 4, 8, 119

Minnesota Constitution, Article I, Section 13 ..... 4, 8, 119, 127

Statutes:

Act of May 22, 1926, 44 Stat. Part II, page 617 ..... 4, 110, 125

Act of April 18, 1928, 45 Stat. Part I, page 431 ..... 4, 110, 125

Miscellaneous:

Note 42 A. L. R. 196, 210 ..... 21, 48

15 C. J. 744, sec. 44 ..... 21, 48

20 C. J. 593, sec. 83 110

20 C. J. 655, sec. 131 110

2 Dunnell's Minn. Digest, sec. 3037 110

9 Halsbury's Laws of England, 2nd ed., p. 691, note (a) 52

Note 26 L. R. A. (N. S.) 927 50

7 R. C. L. 1062, sec. 99 ..... 21, 48

In the Supreme Court

of the United States

OCTOBER TERM

1933

ELIAS A. OLSON, Petitioner

vs.

UNITED STATES OF AMERICA

RANDOR G. KARLSON, Petitioner

vs.

UNITED STATES OF AMERICA

HARRY BREWSTER, Petitioner

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Circuit Court of Appeals for the 8th Circuit.

Brief for Petitioners

RULINGS AND OPINIONS BELOW

The proceedings assigned as error in the Trial Court, Hon. John B. Sanborn, District Judge, presiding, are:

1. Rulings excluding evidence and offers of proof (R. 25-123),

2. Order denying requests for instructions (R. 125, 126),

3. Instruction to the jury (R. 126, 130).

Exceptions to the charge (R. 132, 133).

The cases are not reported.

The majority opinion of the Circuit Court of Appeals (Stone and Booth, Circuit Judges, and Wyman, District Judge) appears at R. 417-429. The dissenting opinion by Circuit Judge Booth appears at R. 429-439. The opinions are reported in

Olson v. United States
(C. C. A. 8th Cir. 1933)
67 Fed. (2d) 24.

JURISDICTION

The judgments in the Circuit Court of Appeals were entered August 21st, 1933 (R. 439, 440). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, 28 U. S. C. A. Section 347 (a), page 359.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether, on the established facts, the special use and adaptability of Petitioners' lands for water storage and hydro-electric power purposes may be taken into consideration in determining the fair market value of such land.

2. Whether, by the Treaty of 1909 between the United States and Great Britain, with respect to Canada, or under general law, the flooding of land in Minnesota bordering the Lake of the Woods, gave rise to rights and remedies for redress on account of such flooding.

3. Whether, on the established facts, the fact that the flowage easement is being acquired by eminent domain would, as a matter of law, exclude from consideration, in determining fair market value, the special adaptability and actual use of said land for reservoir and power purposes.

4. Whether, on the established facts, the exclusion of all evidence of special adaptability and use of said lands for reservoir and power purposes, violated the Fifth Amendment to the Constitution of the United States, and Section 13, Article I, of the Constitution of the State of Minnesota.

5. Whether, on the established facts, the exclusion of all evidence of special adaptability and use was contrary to the spirit, or the express provisions, of the Treaty of 1925 between the United States and Great Britain in respect of Canada, and Acts of Congress giving effect thereto.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States.

2. Article I, Section 13, Constitution of the State of Minnesota (Appendix D).

TREATIES INVOLVED

1. Treaty of 1909 between the United States and Great Britain in respect of Canada, 36 Stat. Part II, Page 2448. (The pertinent parts of said Treaty are in Appendix A.)

2. Treaty of 1925 between the United States and Great Britain in respect of Canada, 44 Stat. Part III, page 2108. (The pertinent parts of said Treaty are in Appendix B.)

STATUTES INVOLVED

Act of May 22, 1926, 44 Stat. Part II, page 617, Amended, April 18, 1928, 45 Stat. Part I, Page 431.

(The pertinent parts of the Statute as amended are in Appendix C.)

STATEMENT OF THE CASE

1. Condensed Statement

Petitioners' lands form a part of the shore line of the Lake of the Woods. They are peculiarly adapted for use, with other lands, as a reservoir for the storage of water in the development of electric power. For more than thirty years, these lands have been used, intermittently, to form the Lake of the Woods storage reservoir. This reservoir was created by the erection of the Norman Dam at the outlet of the Lake of the Woods in Canada. The dam was completed in 1898 by the Keewatin Power Company, for the development of hydro-electric power. It raised the water in the lake about three feet above natural level. Petitioners' lands, together with others, were flooded without right, and no compensation was paid.

The United States, pursuant to Treaty of 1925 with Great Britain in respect of Canada, is acquiring by condemnation a perpetual flowage easement on these shore lands. Petitioners claims were selected by agreement as test cases to determine the measure of compensation or damage to be paid. Petitioners offered evidence tending to prove: that their lands were especially adapted for use as a storage reservoir; that they actually had been so used intermittently for thirty years; that they were so used at the

time of condemnation; that the power companies benefited, and to be benefited, by said use were well established going concerns; that there was conflict and competition between said power interests for the rights to said reservoir; that higher prices were actually paid for said lands because of their use and adaptability for power purposes.

The District Court excluded all such evidence and offers of proof, and instructed the jury that the adaptability and actual use of Petitioners' lands for storage purposes could not be considered in determining their market value, but that their market value must be determined solely from their use and adaptability for agricultural purposes, notwithstanding the fact that said lands have never been used for agricultural purposes, and are not adapted for agriculture.

2. Detailed Statement with Record References

The Lake of the Woods is international boundary water between Minnesota and Canada. It has an area of about 1,500 square miles, and a main shore line in Minnesota of about 140 miles (R. 427). The outlet of the lake by the Winnipeg River is in Canada. There are valuable natural water-power sites along that river. To fully develop them it is necessary to use the Lake of the Woods as a storage reservoir, thereby raising the level of the lake about three

feet, with resultant flooding of its shore lands (R. 417)..

The Minnesota shore lands so flooded total several thousand acres. The titles are variously held by several hundred private parties, municipalities, the State of Minnesota, and the United States. Canadian shore lands are similarly owned (R. 427).

The storage reservoir was created and its value demonstrated by the Norman Dam, built for hydro-electric power purposes by the Keewatin Power Company, a Canadian corporation, at Kenora, Ontario, in 1898. The reservoir has been maintained and used intermittently since that date (R. 22-24). It has increased the power capacity of the Canadian hydro-electric plants in the Winnipeg River by about fifty per cent or approximately 200,000 continuous horsepower (R. 35, 50). This increased power is worth more than a million dollars in profits annually (R. 56).

In 1909 a Treaty was enacted between the United States and Great Britain, in respect of Canada:

> "to prevent disputes regarding the use of boundary water and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other, or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such

questions as may hereafter arise." (Preamble to Treaty of 1909, Appendix A).

The owners of the flooded lands employed counsel to obtain a discontinuance of the trespass on their lands, or the payment of just compensation therefor (R. 62, 74). During the early years they were represented by Hon. Halvor Steenerson, who became a member of Congress from Minnesota. Later they were represented by Hon. Charles Loring, now a Justice of the Supreme Court of the State of Minnesota, and still later by Hon. G. A. Youngquist, one time Assistant United States Attorney General (R. 62).

In 1912, questions arising out of interference with lake levels and the flooding of shore lands were referred to the International Joint Commission. Extensive studies were made, public hearings were held, and a report, with recommendations, was published and filed by the International Joint Commission in 1917 (Final Report of International Joint Commission).

In 1925 a Treaty was consummated between the United States and Great Britain, in respect of Canada, embodying the International Joint Commission's recommendations that a flowage easement on Minnesota shore lands be acquired. (Appendix B).

Said Treaty was put into effect by Act of Congress May 22nd, 1926, amended, April 18, 1928 (Appendix C).

The proceedings involved herein were brought by the Secretary of War, pursuant to said Acts. Commissioners, regularly appointed, assessed the compensation. The government and said land owners appealed from the Commissioners' awards.

At the trial on said appeals, the principal question was whether the use for reservoir purposes which was then being made of Petitioners' lands, and which had been made of them for the past thirty years; and whether circumstances which made said lands especially adptable for such special use; and whether the fact that said actual use and special adaptability had actually increased the market value of said lands continuously since 1915, should be received in evidence, and considered in determining just compensation (R. 24-33, 130, 302-309).

The court excluded all evidence tending to prove any and all of such facts, and instructed the jury not to consider the use which the lands had served, and were serving at the time of condemnation, but to consider only the value of the lands for agriculture, although it was admitted that the lands were not suitable for agriculture and had never been used for that purpose. (R. 24-33, 130, 302-309).

This method of presenting the question of law for review on appeal was adopted by the District Court, on motion of the Special Assistant United States Attorney, that the land owners be required to file written offers of proof. The Government's-mo-

tion was granted, and Petitioners offered to prove the following facts, by competent witnesses (R. 27-124):

By **Mr. Adolph F. Meyer,** Chief Consulting Engineer for the American Section of the International Joint Commission (R. 22-23, 27, 33-40), **Mr. Gardner S. Williams,** an internationally known hydro-electric engineer of outstanding ability and experience (R. 45-49), **Mr. George C. Newton,** hydro-electric engineer with experience not only as an engineer but in the acquisition and development of reservoirs for storage purposes (R. 75); and by many other witnesses, bankers, real estate dealers, and residents (R. 57-104), that their lands have been used for storage in the development of hydro-electric power for thirty years; that there are valuable water-power sites at the outlet of the Lake and in the Winnipeg River; that these water-power sites cannot be fully developed without creating a storage reservoir in the Lake of the Woods, and that such reservoir cannot be maintained without flooding Petitioners' lands (R. 27-28, 33-35, 57-105).

Petitioners further offered to prove that the power industries which have been using their lands for storage purposes are well established and financially responsible; that additional storage for the development of hydro-electric power will be required; that there is a demand for electric power in the Winnipeg River area, and that it is reasonably certain that such demand will increase; that Peti-

tioners' lands are not being condemned for an undeveloped and speculative project, but for an established going industry (R. 23-28, 34-35, 50, 116-122).

That the storage reservoir, of which Petitioners' lands form a part, increases the potential electrical capacity of these power industries by about 50%, or by approximately 200,000 continuous horsepower; that this increase in constant power capacity is worth upwards of a million dollars annually in increased net profit to said power companies (R. 35, 50, 51, 56).

Petitioners offered to prove that there was competition between two groups of power interests for the right to develop and control the storage reservoir; that the value of the right to control the reservoir was so great that one or the other of said power groups would have acquired the necessary flowage rights if the United States Government had not undertaken to do so; that the requirements of good business would have necessitated the acquisition of said flowage rights, and that it was entirely practicable for private enterprise to acquire the same either by or without resorting to eminent domain (R. 35-40, 51-53, 78-80).

Petitioners offered to prove that much publicity was given to the importance of the Lake of the Woods as a storage reservoir, and the great value of its shore lands for that purpose. Copies of arguments and briefs, presented at public hearings, and editor-

ials, with wide circulation, were offered, accompanied by offers to prove that such publicity affected the market value of these lands, because it created public interest in and a demand for Lake of the Woods shore lands (R. 65-66, 71, 73, 74, 85, 90, 101, 102, 116-124, 299-301, 329).

That because of the foregoing facts the market value of these lands at the time of condemnation, and during the entire period of 15 years prior thereto, was affected, and higher prices were paid therefor (R. 38, 57-60, 62, 64-69, 71-74, 84, 85, 94, 97, 100, 310).

Petitioners then offered to prove the fair market value of their land before and after the imposition of the flowage easement, taking into consideration all the facts and circumstances in any way shown by the evidence to have affected market prices (R. 95-98, 102, 103).

Petitioners also offered to prove that in the State of Minnesota flowage easements are recognized and dealt in as separate units of property, distinct from the fee, and offered to prove the fair market value of the flowage easements on Petitioners' lands as such distinct units of property (R. 40-43, 55, 82, 87). That flowage rights and easements have been recognized and reserved in instruments of conveyance (R. 105-106).

The District Court excluded all of Petitioners' evidence and offers to prove, adopting the view of

Government counsel that the special adaptability of Petitioners' land for reservoir purposes, and the fact that their lands were then used, and long had been used, for that purpose, could not, as a matter of law, be considered in determining their market value, conceding Petitioners' offers of proof to be true. The effect of the trial court's ruling was the same as if a demurrer to Petitioners' evidence had been sustained (R. 24, par. 32; R. 27, par. 3).

The question for determination by this Court is specific and clear cut. **The question is, assuming the facts contained in Petitioners' offers of proof to be true, may such facts be taken into consideration in determining the market value of Petitioners' lands?**

Circuit Judge Booth in his dissenting opinion very clearly stated the question presented on the record in the following language:

> "There is no point raised as to the sufficiency of the offers to prove; and the charge of the Court was explicit. It read:
>
> " 'In computing the fair market value, both before and after the imposition of the easement, you will take into consideration all of the uses for which the property was available on May 4th, 1929, and May 5th, 1929, and determine what use it was most valuable for, and base your award thereon; but you will not make an award based on any claim for reservoir value. I have held that under the law the value of these lands

could not be based upon the use of the lake and its shores for reservoir purposes. It is, as I understand it, conceded that the only other use for which these lands are suited, with the exception perhaps of Mr. Olson's tract, is for agricultural purposes, or purposes relating to agriculture, so that it is for those purposes that you are to value these lands.'

"The offers to prove, the rulings thereon, and the charge of the Court were all made pursuant to an agreement by Court and counsel that the crucial question should be raised and embodied in the record by offers to prove and by charge of the Court, as the clearest and most concise way of presenting the question to the Appellate Court." (R. 437.)

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals erred:

1. In holding that the actual use of Petitioners' lands for reservoir purposes could not be considered in determining market value (R. 426, 427).

2. In holding that the Treaty of 1909 between the United States and Great Britain, in respect of Canada, did not give Petitioners redress for the unlawful flooding of their lands (R. 426, 427).

3. In holding that Petitioners had no remedy

for the wrongful flooding of their lands (R. 426, 427).

4. In holding that the potential use and special adaptability of Petitioners' lands were too remote and speculative to influence market value (R. 426, 427).

5. In holding that the exercise of eminent domain, in acquiring the flowage easement, necessarily excludes special adaptability for a useful purpose from consideration in determining market value (R. 426, 428).

6. In affirming the judgments of the District Court (R. 426-429).

SUMMARY OF ARGUMENT

Petitioners' lands are specially adapted for use in forming a storage reservoir for the development of hydro-electric power, and they have been used for that purpose since 1898.

Because of this special adaptability and actual use higher prices have been paid for these and similar lands than they were worth on the market for agricultural purposes. It is not disputed in the record that this adaptability and actual use, in fact, increased market prices for a continuous period of thirteen years, from 1916 to the date of condemnation.

Because of their actual use for reservoir purposes, these lands have never been adapted to agriculture, and have never been used for that purpose. Notwithstanding that fact the trial court excluded all evidence of special adaptability and actual use, and instructed the jury to disregard the adaptability and use of these lands for reservoir purposes, and base its verdict, solely, on their adaptability and use for agricultural purposes.

CLAIMS OF THE PARTIES

(a) The Government claimed that multiplicity of ownerships and other deterent factors operate, as a matter of law, to exclude special adaptability and actual use from consideration in determining market value, conceding that such adaptability and use have actually increased market prices.

(b) Petitioners, recognizing that the factors urged by the Government might depress market values, claimed that because the record proves that market values were, in fact, actually increased by the special adaptability and use of these lands, such adaptability and use must be considered in estimating market value; that the favorable as well as the unfavorable factors must be considered.

The question of law and the undisputed facts in the record were clearly stated in the dissenting opinion.

Judge Booth said:

"It should be kept clearly in mind that the testimony sought to be introduced in the cases at bar, but excluded, was not offered for the purpose of obtaining damages for past trespass, but solely for the purpose of establishing an existing and established element of value of the land, to be considered by the jury . . . and, further, that the testimony sought to be introduced, but excluded, was not offered for the purpose of establishing a value of the flowage use which had come into existence by reason of the commencement of the condemnation proceedings. The testimony was proffered for the purpose of establishing the value of a flowage use which had existed for many years and which value was claimed to be an important element in the total value of the particular land taken.

". . . the landowners offered to prove that shore lands similar to those involved had been purchased long prior to the present condemnation proceedings because of their use for storage or reservoir purposes; and that larger prices were paid for such lands for that reason; that the conditions affecting the Lake of the Woods, and existent before the condemnation proceedings were commenced, were such as would naturally affect the market value and market price of shore lands; that the market value and market price of shore lands similar to those involved were in fact affected by their adaptability for

use, coupled with actual use for flowage or reservoir purposes; that it was reasonably certain that the interests controlling the power projects below the outlet of the lake would seek to acquire flowage rights had not the treaty of 1925 been made; that there was competition between Ontario interests and Winnipeg interests in regard to the acquirement and control of the Lake of the Woods reservoir; that such flowage rights had a well-recognized rental value; and the amount of such rental value.

* * * * *

"The Government contended, among other things, that before flowage or reservoir use of said shore lands could be an element of value of said lands, there would have to be a unification of the many titles to the shore lands and a control of the waters of said lake.

"It seems to me that the question is one of fact whether the adaptability for reservoir or flowage purposes coupled with the long-continued actual use for such purpose entered into the value of such lands or not. Whether such element of value would have been greater if the titles to the various parcels had been unified is not material; nor is it material whether or not there **should have been logically** no element of value in the lands based upon adaptability and use for reservoir purposes until the titles were

unified. Unification of the titles may have been somewhat impracticable, but co-operation between the various owners including the United States and Canada (even by acquiescence) as to maintenance of lake levels was not impossible, but an established fact, even though the exact extent of the co-operation was not definitely fixed.

"The question whether the adaptability, coupled with the actual use, did in fact enter into the value of the lands was, in my opinion, for the jury, and the question should have been submitted under proper instructions." (Boldface is italicized in record). (R. 435-437).

The record presents a clear-cut question: Assuming the facts offered to be proved by Petitioners to be true, must the special adaptability and actual use of the land for reservoir purposes be excluded from consideration; and must the jury base its verdict on assumed adaptability and use for agriculture, when it is proved, as a fact, that adaptability and use for agriculture have never existed in fact, and never can exist, because of the prior use and the perpetual easement for storage purposes?

1. **The general rule** is that what the property is worth in the market viewed with reference to all uses to which it is plainly adapted is the measure of just compensation.

2. **Reasons advanced in majority opinion for not applying the general rule** are, that **the actual use** of Petitioners' lands for storage must be disregarded because it was of no value to Petitioners, since they had no right of redress against the unlawful use. The adaptability of said lands for **potential use** must be disregarded because it was too remote and speculative to influence market values; and because unification and use would be impracticable except by the exercise of eminent domain; and where the power of eminent domain is exercised, special adaptability must be left out of consideration.

3. Analysis of the reasons advanced discloses that the facts assumed in the majority opinion are disproved by the record, because:

a. Market values were **in fact** increased because of the special adaptability and use;

b. The increase in market prices existed before and entirely independently of the condemnation;

c. There was potential competition and demand for said lands, and it was entirely practicable for the power companies competing for said lands to have acquired the flowage rights and developed the storage reservoir by private enterprise, without eminent domain.

d. Said reservoir was used, and the unification of said lands was an accomplished fact for thirty years.

e. Whether Petitioners were able to recover compensation for the use of their lands, in the past, is not controlling, since the record proves that higher prices were paid for these lands because of their special adaptability and use.

4. The Treaty of 1909 conferred upon Petitioners rights of redress on account of the unlawful use of their lands; and even without the Treaty of 1909 Petitioners had such rights under general law.

7 R. C. L. § 99, p. 1062

Note 42 A. L. R. 196, 210

15 C. J. Page 744, § 44

Rickey Land & Cattle Co. v. Miller & Lux
(C. C. A. 9th Cir.)
152 Fed. 11, 16

Stillman v. White Rock Mfg. Co.
23 Fed. Cases No. 13466
3 Woodf. & M. 539

Mannville Co. v. City of Worchester
138 Mass. 89
52 Am. Rep. 261

Bulwer's case
4 Coke (part 7) 49
77 Eng. Reprint 411

Scott v. Brest
2 T. R. (Eng.) 238

Whether these titles are unified by the exercise of eminent domain is immaterial, because the record proves that these lands, due to their inherent adaptability for storage purposes, and their actual use for that purpose, possessed a higher market value.

New York v. Sage
239 U. S. 57

McGovern v. New York
229 U. S. 363

U. S. v. Chandler-Dunbar Water Power Co.
229 U. S. 52

Simpson v. Shepard (Minnesota Rate cases)
230 U. S. 352, 451

Shoemaker v. United States
147 U. S. 282

Monongahela Navigation Co. v. U. S.
148 U. S. 312

5. The general principles deducible from the decisions of this court, and other cases, are, that market value must be determined by considering all facts and circumstances which are shown to have affected such value; that inherent adaptability for a special purpose, which is actually in use at the time of condemnation, and which is shown to have had an ef-

fect, in fact, upon market prices of similar lands, must be taken into consideration in determining just compensation.

Brooks-Scanlon Corp. v. U. S.
265 U. S. 106, 123, 125, 126

Ford Hydro-Electric Company v. Neely
13 Fed. (2d) 361

Conan v. City of Ely
91 Minn. 127
97 N. W. 737

Weiser Valley Land & Water Co. v. Ryan
(C. C. A. 9th Cir.)
190 Fed. 417, 423

Niagara Lockport & Ontario Power Co. v. Horton
231 App. Div. 402
247 N. Y. S. 761

Gearhart v. Clear Spring Water Co.
202 Pa. St. 292
51 Atl. 891

Emmons v. Utilities Power Co.
82 N. H. 181
141 Atl. 65

Alloway v. Nashville
88 Tenn. 512
13 S. W. 123

Sargent v. Merrimac
196 Mass. 171
81 N. E. 970
11 L. R. A. (N. S.) 996

Edwards v. City of Cheyenne
19 Wyo. 110
114 P. 677

6. The record having established without contradiction, both the adaptability and the actual use of Petitioners' lands for a special purpose, and that such adaptability and use actually increased market prices for a period of many years before the condemnation, it follows logically and necessarily that such special adaptability and actual use must be taken into consideration in determining just compensation.

7. The value of the flowage easement being acquired, considered as a separate unit of property, giving due consideration to its use and adaptability, and the difficulties involved in its acquirement and utilization, is the measure of just compensation; because flowage easements are dealt in as distinct units of property, and all of Petitioners' usable flowage right is being acquired in these proceedings.

8. The Treaty of 1925, and the Acts of Congress giving it effect, contemplate that the special adaptability and actual use of Petitioners' lands shall be considered in determining just compensation.

From the foregoing considerations, it is concluded that the judgments which excluded from consideration facts upon which alone the market value of these lands has been based for many years; and which required the jury's verdict to be based solely upon assumed adaptability and use for agriculture, although the lands never have been, and never can be, used for that purpose, should be set aside, and new trials granted.

ARGUMENT AND AUTHORITIES

I. GENERAL RULE ON MEASURE OF JUST COMPENSATION IN EMINENT DOMAIN.

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what it is worth from its adaptability for valuable uses."‡

Mississippi & Rum River Boom Co. v. Patterson
98 U. S. 403, 407-408
Conan v. City of Ely
91 Minn. 127
97 N. W. 737

‡Boldface supplied at the direction of counsel, wherever it appears, unless otherwise indicated.

II. REASONS ADVANCED IN MAJORITY OPINION OF THE CIRCUIT COURT OF APPEALS FOR NOT APPLYING THE GENERAL RULE TO THE FACTS IN THIS RECORD.

The principal reasons advanced in the majority opinion for not applying the general rule are:

(A) ACTUAL USE—REASONS FOR EXCLUDING

1. In Fact

The actual use being a trespass "was a positive reducer of value" (R. 426), and "there was no demand for this use by anyone who would or could be made to compensate him therefor" (R. 427).

2. In Law

Since the "actual use" was by foreign trespassers the property owners had no "hope of redress" (R. 426).

(B) POTENTIAL USE—SPECIAL ADAPTABILITY FOR—REASONS FOR EXCLUDING

1. In Fact

The multiplicity of titles and ownerships, and the difficulty of unification were such that the possibility of accomplishment did not hold "that degree of probability or possibility **which could affect the**

value of these lands." Before the Convention of 1925 "such a tract of land would be worth only its use for agricultural or fishing purposes, with the burden of the flowage actually thereon. . . ." Beyond the compensation granted by the treaty "there is no vestige of reason for an increase in the sales price of these lands. . . ." "Even if owners and buyers might actually have thought this compensation (provided in the Treaty of 1925)* would include an enhancement from use for flowage purposes there was no justification in law for such view. Such thought could spring only from the Convention which had in mind this very improvement and values arising because of the particular improvement cannot be included in compensation." (R. ft. 427, 428).

2. In Law

"Also this Convention clearly provided for accomplishment of acquisition through eminent domain, and where the use is possible only through the exercise of that power 'it must be left out' (McGovern v. New York, 229 U. S. 363, 372) in estimating the probability of such a use as affecting sales value and compensation." (R. ft. 428.)

III. DISCUSSION OF REASONS ADVANCED IN MAJORITY OPINION

(A) ACTUAL USE

1. Examination of Assumed Facts

As a reason for excluding the actual use which

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*Parenthesis supplied by counsel.

was made of Petitioners' lands, the majority of the Circuit Court of Appeals assumed certain facts to be true, which if not true would overthrow the Court's decision.

The majority opinion assumes, as a fact, that the "actual use" which was made of Petitioners' lands "was a positive reducer of value," and that "there was no demand for this use by anyone who would or could be made to compensate him therefor."

The uncontradicted facts in the record prove that these assumptions of fact are unfounded.

The actual use of Petitioners' lands for reservoir purposes might benefit the owners in any one of three ways, or in a combination thereof:

(A) The owners might benefit by personally participating in the actual use;

(B) By collecting damage or rental for the actual use;

(C) By an increase in the market price caused by the actual use.

The majority opinion assumes, erroneously we believe, that Petitioners were powerless to collect damage or rental for the unlawful use of their lands, and, for that reason, that such use could not be of any value to them. In this conclusion we believe the

majority opinion is clearly in error, because it completely ignores the undisputed increase in the market value of these lands.

It is not, and cannot be, disputed that for many years the market value of these submerged lands was substantially increased because of their actual use and adaptability for reservoir purposes. That fact is attested to by numerous witnesses (R. 27-124). **Petitioners at all times before the taking could have obtained a higher price for their lands because of this special use and adaptability.**

Whether Petitioners could collect damage or rental for the trespass is not the sole test of the value to them of the special use being made of their lands, as assumed in the majority opinion. What would their lands bring when sold on the market? That was the true test of the value of their lands to them. **The fact that actual use for storage increased the market value of these lands is of greater significance in determining market value than is the possibility of collecting damage for the trespass. The owners held their lands for sale, to be used in accomplishing the lawful purposes for which they were plainly adapted. They did not hold their lands primarily for the purpose of collecting damage for their unlawful use.**

Increase in market value is as truly a benefit to Petitioners as would be the right to collect compensation for the use of their land. And since market

value is the subject of inquiry, any fact or circumstance which has affected it must be considered even under the majority hypothesis.

The majority opinion further assumes as a fact that "there was no demand for this use by anyone who would or could be made to compensate him (the owner) therefor, and that accordingly the use must be disregarded.

Obviously this reasoning is likewise unsound, for since the owners were able to obtain a higher selling price for **their lands** because they were used for storage purposes, it cannot be said that such use was of no value to them, regardless of what demand there may or may not have been for the **use itself. It was the LAND which Petitioners held for sale and not the USE. It is the increased market value of THEIR LAND, and not the market for the USE which benefited the owners. It is not disputed in the record that the LANDS did sell for a higher price notwithstanding that the USE then being made of them was illegal.**

But the record disproves the majority assumption that "there was no demand for this use by anyone who would or could be made to compensate him therefor." The record proves without contradiction, that there was a conflict of interest between the power concerns operating in Ontario and those operating in Manitoba, and that the value of the reservoir was so great, and the competition and conflict

between the power interests so fundamental that the one group or the other of these power interests would have acquired the flowage rights (R. 22-75).

The true situation disclosed by the record is clearly stated by Judge Booth in his dissenting opinion, as follows:

> "The land owners offered to prove . . . that it was reasonably certain that the interests controlling the power projects below the outlet of the lake would seek to acquire flowage rights had not the treaty of 1925 been made; that there was competition between Ontario interests and Winnipeg interests in regard to the acquirement and control of the Lake of the Woods reservoir;" (R. 436).

The majority decision is based upon the further assumption that:

> "It was not until the Convention of 1925 that there was any possibility of the landowner receiving **any** compensation for this taking of his land. Nor has there been before or since any possibility of any other demand for such use." (R. 427).

The record proves the exact opposite of the foregoing assumption.

It is undisputed that similar lands were actually bought and sold on the market for higher prices because of their actual use for reservoir purposes, **even**

before the report of the International Joint Commission was published in 1917.

As early as 1916 Mr. William Rulien, a real estate dealer, purchased 160 acres, practically all under water when he purchased it. He offered to prove that he paid a higher price for said land than it was worth for agriculture. He stated that he would not have purchased it at all except for its use as a reservoir (R. 90-91).

In 1920, five years before the Treaty of 1925, **Mr. Barney Arneson** purchased 160 acres nearly all under contour 1064, and paid a higher price for it because of its use for reservoir purposes (R. 64); offers of proof to the same effect were made by **Mr. Linus Landby** (R. 58) and **Mr. H. Robberstad** (R. 71, 72).

Petitioner Brewster acquired his land in 1922, and paid a higher price for it because of its use as a reservoir (R. 94).

Petitioner Olson filed on his homestead May 8, 1923. He would not have filed on this tract except for the fact that a part of it possessed higher value for storage purposes (R. 97). Fifty-six acres of said homestead was under contour 1064 (R. 98).

In 1921, four years before the Treaty of 1925, **Petitioner Karlson** purchased 160 acres practically all under water (R. 99). He purchased the same be-

cause of its use and value for power purposes (R. 100).

Clearly the Treaty of 1925 could have no effect on prices paid for lands many years before the enactment thereof.

Furthermore, the final arugments before the International Joint Commission (Respondents' Ex. 32), which were published and circulated in the Lake of the Woods area, demonstrate the inaccuracy of the majority opinion that "it was not until the Convention of 1925 that there was any possibility of the land owner receiving any compensation for this taking of his land."

The following excerpts are typical:

Mr. Isaac Campbell, K. C., representing the power interests of the City of Winnipeg, said:

> "I think we ought to pay a fair share, our full share and that there is no objection to its being computed fairly, and liberally, not put at the exact market value of 10 per cent, but **at 20 or 25 per cent, that could be with safety added to what would be the estimated market value.** And, more than that, that value should, as soon as your report is acted upon, be paid, then; that is, be paid now, without waiting until the time comes when we will need to raise the water. . . . I think we should pay the full amount of the compensation that should be charged against us, pay it now. . . ." (R. 116.)

Mr. Campbell made that statement in 1916, nine years before the Treaty of 1925 was enacted. The American property owners have not yet been paid one penny for the use or taking of their land.

Mr. D. H. Laird, representing the Winnipeg Electric Railway Co. and the Winnipeg River Power Co., in his argument before the International Joint Commission, stated:

> "As power users, **we desire that higher level** and, as indicated by Mr. Campbell and Mr. Rockwood, the power users consider that **adequate and full compensation should be made to the landowners for the land necessarily taken for that higher level**; but the method of levying that compensation upon the power users, of course, is a purely domestic matter. If the power users in Canada get the benefit of it, I have no doubt that the Canadian authorities would see that they would pay it ultimately." (R. 117.)

Hon. C. J. Rockwood, of Minnesota, counsel for Minnesota & Ontario Power Company, filed a brief with the International Joint Commission which was published and circulated among the property owners and others interested in the storage reservoir, which brief was offered in evidence as Respondents' Exhibit 33. Mr. Rockwood said:

> **"Using the smaller figure, 115,000 horsepower, as the result of regulation, and the low estimate of $10.00 per annum as the value of a**

horse power, the result is $1,150,000.00 per annum, or interest at 5% on $23,000,000.00.

* * * * *

"A water power property consists not only in the riparian ownership of land suitable for the construction of a dam. Equally necessary are other property rights, such as flowage rights.

* * * * *

"The land necessary for this is part of the water power property. The site for storage reservoir, although remote, is equally a part of the water power property. . . .

"In the case of the Winnipeg River, the remotest and smallest reservoir site in the hills of northeastern Minnesota, or across the line in Ontario, is as necessary to the full development of the water power property whose wheels are to be turned at Du Bonnet Falls, as is the location for the dam and power house itself . . . .

". . . To hesitate in the expenditure of a few hundred thousand dollars, for the cost of flowage rights and protective works, would be nothing less than crime against succeeding generations." (R. 119-121.)

Publicity of such authoritative character could not do otherwise than increase the market price of

these lands. This publicity and the consequent **increase in market value occurred in 1916** even before anyone knew what would be the recommendation of the International Joint Commission and **nine years before the Treaty of 1925.**

Mr. Adolph F. Meyer, Chief Consulting Engineer for the American Section of the International Joint Commission, probably the best informed man in either country on the power interests and resources in the Lake of the Woods region, and Consulting Engineer for the Keewatin Power Company which built the Norman Dam that controls the lake levels, offered to prove that he was familiar with the conflict between the two groups of power interests competing for control of the reservoir, and that he was acquainted with the requirements of said two groups. That the difference in the requirements of said two groups was substantial and fundamental, and was of such a character as would, in the ordinary course of business, cause the Ontario group to compete with the Manitoba group for the right to develop and control the reservoir. That, because of the great value of the storage rights, and the conflict of interest between said two groups, the one or the other of said groups would have acquired the flowage easement if the Government had not undertaken to do so; and that it would have been entirely practicable for either of said groups to have acquired the flowage rights through private negotiation and purchase (R. 37-40).

Gardner S. Williams and **George C. Newton,** both hydraulic engineers of recognized ability and

experience, offered to testify to the same effect (R. 45-51, 54), that it was entirely practicable for private interests to acquire said flowage easement, and that private interests would have acquired the same if the Government had not done so.

Mr. George C. Newton (R. 75), experienced in the development of hydro-electric projects in international waters, offered to prove that the fact that the lake is international water would not retard development by private enterprise; that an illustrative case in point is the development by the St. John River Power Co. in the St. John River, which forms a part of the international boundary between the State of Maine and the Province of New Brunswick. The similarity between the St. John River development and the Lake of the Woods reservoir is shown by Respondents' Exhibit 1, material portions of which are contained in the record (R. 108-115).

Mr. Newton offered to prove that he had experience in acquiring flowage rights in the State of Michigan, where the right of eminent domain was only recently granted to hydro-electric companies; that he has acquired, by private negotiation without eminent domain, extensive flowage rights in the State of Michigan, and that in his judgment it would be entirely practicable for private interests to have acquired the flowage rights on the Lake of the Woods shorelands without aid of condemnation (R. 76-80).

These facts stand undisputed in the record. Therefore, the majority assumption that "it was not until the Convention of 1925 that there was any possibility of the landowner receiving any compensation for this taking of his land," and that there has not "been before or since any possibility of any other demand for such use," is entirely unfounded. The judgments based on such erroneous assumptions should be reversed.

The majority decision is based on this further assumption or conclusion:

> **"Justice to the landowner and to the public would demand that this flowage use be excluded from estimation of sales value of the lands unless it can be seen that such use was properly an element of such value, irrespective of these actualities. In other words, if such use was properly an element of such value before this trespass then it continued to be such in spite thereof and should be taken into account—otherwise not."** (R. 427.)

It is not easy to be certain just what is meant by the above quoted language. The effect of the majority decision is to exclude **actual use** from consideration in determining **market value**, but the reason for excluding it is not so clear.

In order to understand the majority reasoning we must know what is meant by the word **"properly,"** and by the phrase **"irrespective of these actualities."**

To what "actualities" does the majority refer? It would appear that by "actualities" is meant the assumptions of fact referred to above, namely, that the actual use was of no value to the property owner; that it was "not until the Convention of 1925 that there was any possibility of the landowner receiving any compensation for this taking of his land," and that there has not "been before or since any possibility of any other demand for such use."

But the record completely disproves these assumptions; therefore, they cannot be regarded as "actualities."

It is equally difficult to be certain what is meant by the phrase "properly an element of such value." The majority opinion assumes that **actual use** was not "**properly** an element" of market value; but no reason is advanced why actual use **which, in fact, increased the prices paid for similar lands** should not be "properly an element" of market value. The majority opinion simply assumes, without proof or demonstration, that actual use is not "properly an element" of market value, and then concludes that because it was not "properly an element of such value" it may not be taken into consideration in determining market value.

With due respect, it would appear that the majority opinion begs the question. It assumes the answer to the very question at issue, and then reasons in a circle from its unwarranted assumption. The

very question for determination is whether actual use is "properly an element" of market value. Obviously, that question may not be answered by the process of reasoning enployed in the majority opinion.

We believe that any fact or circumstance is **"properly an element" of market value, provided such fact or circumstance** has actually affected market value.

The true situation was expressed by Judge Booth as follows:

> ". . . the landowners offered to prove that other lands similar to those involved had been purchased long prior to the present condemnation proceedings because of their use for storage and reservoir purposes, and that larger prices were paid for such lands for that reason; . . . (R. 436.)
>
> ". . . nor is it material whether or not **there should have been logically** no element of value in the lands based upon adaptability and use for reservoir purposes until the titles were unified." (R. 437.)

The dissenting opinion clearly points out the error of the majority of the Court. Equally unsound, we believe, is the majority conclusion that:

> "if such use was properly an element of such value **before this trespass** then it continued to be

such in spite thereof, and should be taken into account—**otherwise not.**" (R. mid. 427.)

In determining whether any piece of property has any value for a special use, the first inquiry is whether the property is **physically adapted** to such use. The next inquiry is whether such use is likely **soon to be required or employed.** Physical adaptability creates value when employed to render service.

The actual use of Petitioners' lands by the Canadian power interests answered both of these questions. As early as 1912 everyone knew that these lands were physically adapted for the use they then served. Everyone knew that actual use would continue. The power interests had invested millions on that assumption (R. 117, 28, 34-40). This was a circumstance which would naturally increase market prices. **The record proves that market prices were increased.**

The error underlying the majority opinion is still further shown in its conclusion that:

> "If such use was properly an element of such value before this trespass then it . . . should be taken into account—otherwise not." (R. mid. 427.)

The majority conclusion requires that use must be considered and values determined as of a time "before this trespass." The trespass began in 1898 when the Norman Dam was built. The jury was re-

quired to determine market values at the time of condemnation in 1929. The majority reasoning eliminates from consideration the use of these lands during the period between 1898 and 1929. No reason has been suggested for eliminating the period of **actual use.** It is improper to do so.

It might very well be that "before this trespass" in 1898 the extent and the certainty of this hydro-electric development could not be foreseen, and that accordingly it might not then have affected market values; but certainly, after millions had been invested, and the reservoir had been used for 15 years, as was the case in 1916, when the power companies' representatives made their arguments before the International Joint Commission, there could be no doubt in the mind of anyone that the use being made of these shore lands was extremely valuable, and that such use would continue permanently. There was every reason why the actual use which was made of these lands in 1916 should affect market values, while in 1898 "before this trespass" the use which was then being made of them might have had no effect whatever upon market values.

It is difficult to follow the majority conclusion that the value of this ACTUAL USE "before this trespass" in 1898 may be considered by the jury in determining market value in 1929, but that the value of the ACTUAL USE in 1929 must be disregarded.

Enough has been said to point out the errors in the assumptions of fact, and in the reasoning under-

lying the majority decision. They arise from the basic error in excluding from consideration the **actual use** which had actually increased market prices. The judgments embodying the original error should be reversed.

2. Examination of Statement of Law

As a reason for excluding from consideration the actual use which was made of Petitioners' lands, the Circuit Court of Appeals assumed that:

> "for more than thirty years, these lands had borne the burden of this trespass to their detriment without hope of redress . . . It was a peculiar and unfortunate situation where the landowner was helpless." (R. 426-427.)

The majority decision excluding **actual use** from consideration, is based very largely on the assumption that Petitioners had no redress against the unlawful use of their lands. Is this assumption valid?

(A) TREATY OF 1909 GAVE PETITIONERS REDRESS

Article II of the Treaty of 1909 entered into between the United States and Great Britain in respect of Canada, provides:

> "but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary,

> shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing, or to cases expressly covered by special agreement between the parties thereto." (Appendix A.)

Although the majority opinion does not mention the foregoing Article of the Treaty, the decision of the Court excluding **actual use** from consideration requires a holding by the Court that Article II of the Treaty of 1909 gave Petitioners no rights against "interference with" the waters on the Canadian side of the boundary.

The Treaty of 1909 is not limited to the Lake of the Woods. It is a Treaty of general application, and applies to all boundary waters between the United States and Canada. The Treaty should not be construed so as to limit unduly the rights of American property owners.

If it were not for the last provision in Article II that "this provision shall not apply to cases already existing. . . ." probably no one would question that the Treaty conferred upon Petitioners rights to be redressed on account of the wrongful use of their land.

What is meant by the phrase **"cases already existing"**? In view of the fact that the Proclamation accompanying the Treaty recites that some of the purposes of the Treaty are:

> "to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, and interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions **as may hereafter arise,"** (Appendix A.)

we believe that it is reasonable to construe the words **"cases already existing"** as applying to occasions or periods when there was "interference with" the boundary waters **"resulting in injury on the other side of the boundary."** It is only such occasional interferences that "shall give rise to the same rights and entitle the injured parties to . . . legal remedies."

It is significant that from 1898 to 1909 inclusive, there were five separate periods of time when the lake level was below 1059 sea level datum (R. 213, Gov't. Ex. 25). The ordinary high water mark to which the Government had a right to maintain the lake level was 1059 (R. 128-129). Accordingly there were no trespasses during these five separate periods of low water. Hence there were no "cases existing" for those periods.

The construction and maintenance of the Norman Dam was not a trespass. It gave rise to no cause for damage. But during the period from 1898 to 1909 inclusive, there were a number of periods of high water which caused damage. Each period of high water gave a separate cause for damage. Each

period of high water prior to the Treaty of 1909 presented a "case already existing." Article II of the Treaty expressly provides that these "cases already existing" should not be affected by the treaty. It was the evident intention of the High Contracting Parties that the Treaty of 1909 should not "apply to cases already existing" and growing out of the periodic flooding of American lands. In other words the Treaty of 1909 was not intended to affect past claims. It was intended to establish future "rights" and obligations.

It is significant that the word "cases" was used in the Treaty, rather than conditions, or diversions, or interference, or some similar term. It is fair to infer that if a condition such as created by the Norman Dam on the Lake of the Woods were intended to be excluded from the future application of the treaty, it would have been easy to express it in appropriate and unambiguous language.

It will be observed that Judge Booth makes no reference to the exception contained in Article II as to "cases already existing", but in his dissenting opinion he appears to be of the opinion that the Treaty of 1909 gave Petitioners a right of redress (R. 431-432.) This fact, together with the fact that Judge Booth uses the word "trespasses" in the plural (R. 430-431) might tend to indicate that he was of the opinion that there were a number of "trespasses" before the Treaty of 1909 was enacted, and that those were the "trespasses" referred to in Article II of the Treaty as the "cases already existing."

In this connection Articles IV and VIII of the Treaty of 1909 should be taken into consideration (Appendix A).

We believe that the Treaty of 1909, when taken as a whole, indicates a clear intention by the High Contracting Parties that any claims which might arise in the future for injuries caused by interference with boundary waters on either side of the boundary shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such interference occurred.

In would appear that cordial relationships between the United States and Canada would be promoted by giving the Courts of each country jurisdiction over claims arising in the other country because of interference with boundary waters. We believe that such was the plain intention of the Treaty of 1909, and that it is for the best interests of both countries that the Treaty be so construed.

(B) PETITIONERS HAD REDRESS UNDER GENERAL LAW

The dissenting opinion of Circuit Judge Booth deals with Petitioners' right of redress under general law, as follows:

> "Nor was the situation of the landowner as to recovery of such flowage use value as damages from the trespassers one of mere hopeless speculation. **Were this the case, it would be a reproach**

to both Governments concerned. On the contrary, it is, in my opinion, a reasonable and safe conclusion that once the facts were established, the landowner could get compensation in damages in the Courts of Canada, if the trespass had been committed by private parties; and probably could obtain compensation by Petition of Right, if the flowage use had been taken by authority of the Canadian Government (See Halsbury's Laws of England, Vol. 1, p. 17, paragraphs 21, 22, 23 and 24; and Vol. 10, pp. 26-30; also Vol. 2, D. L. R. (1928), p. 625, annotation 'Petition of Right' by Arthur S. Bourinot); and certainly he could obtain redress through diplomatic action between the two Governments.

"Such substantially, was the situation, in my judgment, when the present condemnation proceedings were brought." (R. 433.)

WHERE REAL ESTATE SITUATED IN ONE JURISDICTION IS INJURED THROUGH AN ACT COMMITTED IN ANOTHER JURISDICTION THE OWNER MAY ELECT WHETHER HE WILL SUE IN THE JURISDICTION WHERE THE LAND LIES, OR THAT IN WHICH THE ACT CAUSING THE INJURY WAS COMMITTED.

7 R. C. L. § 99, p. 1062

Note 42 A. L. R. 196, 210

15 C. J. Page 744, § 44.

The general proposition above stated is an exception to the general rule that an action brought for trespass to real estate must be brought within the jurisdiction of the court wherein the real estate in question is situated.

Rickey Land & Cattle Co. v. Miller & Lux
(C. C. A. 9th Cir.)
152 Fed. 11, 16

"The general doctrine of the common law is that an action for injury to real property, as trespass, or case for nuisance, is local, and must be commenced within the county or district in which the land lies. This seems to be controlled, however, by the rule above referred to, that, where an act has been committed in one jurisdiction which causes injury to realty in another, a suit may be brought in either."

Accord,

Stillman v. White Rock Mfg. Co.
23 Fed. Cases No. 13466
3 Woodf. & M. 539

Rundle v. Delaware & R. Canal
21 Fed. Cases No. 12139
1 Wall. Jr. 276

Foot v. Edwards
9 Fed. Cases No. 4908
3 Blatchf. 310

Mannville Co. v. City of Worchester
138 Mass. 89
52 Am. Rep. 261

Thayer v. Brooks
17 Ohio 489
49 Am. Dec. 474, and note

Smith v. Southern Ry. Co.
136 Ky. 162
123 S. W. 678
26 L. R. A. (N. S.) 927, and note

Armendiaz v. Stillman
54 Tex. 623

The American cases appear to be in accord with the common law of England on this proposition.

Bulwer's Case
4 Coke (part 7) 49
77 Eng. Reprint 411

Scott v. Brest
2 T. R. (Eng.) 238

In **Bulwer's case, supra, the Court said:**

"In all cases where the action is founded upon two things done in several counties, and both are material or traversable, and the one without the other doth not maintain the action there the plaintiff may choose to bring his action in which of the counties he will . . ."

"If a man doth not repair a well in Essex, which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default, as it is adjudged in 7 H. 4, 8; or I may bring it in Middlesex, for there I have the damage, as it is proved by 11 R. 2."

We believe that it is well established on the authorities that Petitioners had a right under general law to be redressed for the use and flooding of their land.

(1) If the flooding was caused by the Keewatin Power Company, acting under authority of the Canadian Government, and if such action was not a tort, Petition of Right would lie against the Canadian Government for compensation for such use.

Attorney General v. De Keysers Royal Hotel, Ltd.
(1920) A. C. 508, 122 L. T. 691

36 T. L. R. 600, 64 Sol. Jo. 513, H. L.
Yates v. The King
20 Ex. C. R. 175

See also authorities cited by Judge Booth, (R. 433).

(2 If the flooding was caused under circumstances specified in (1) except that the use was tortious, Keewatin Power Company would be liable in trespass.

9 Halsbury's Laws of England, 2nd Ed. p. 691, note (a)

Feathers v. The Queen
6 B. & S. 257, 35 L. J. Q. B. 200, 12 L. T. 114, 122 E. R. 1191.

Tobin v. The Queen
16 C. B. N. S. 310, 33 L. J. C. P. 199, 10 L. T. 762, 143 E. R. 1148

Attorney General v. De Keysers Royal Hotel, Ltd., supra.

(3) If the flooding was caused by Keewatin Power Company, acting without governmental authority, the company would be liable in trespass. See authorities cited pages 48, 49, 50, supra.

From the foregoing examination of the facts and of the law, it appears that the assumptions underlying the majority decision, excluding actual use from consideration, are unfounded, and that accordingly the decision should be reversed.

(B) POTENTIAL USE—SPECIAL ADAPTABILITY FOR

1. Comparison of Facts assumed in the Majority Opinion with Facts Established in the Record.

The majority opinion excluding adaptability for potential use from consideration is based upon the

following assumed conclusions, which we believe are unfounded:

> "To assemble all of this flowage affected land would require acquisition of the rights of this great number of persons (including two Nations, one State, two Provinces, Indian tribes and private persons) in this large number of separately and variously owned tracts. We cannot think that such an eventuality held that degree of probability or possibility which would affect the value of these lands and be an influence or consideration affecting, in the slightest degree, the minds of sellers and buyers thereof in arriving at a fair price therefor. **Such use is too remote and speculative to have such effect in fact** and, therefore, can have none in law.
>
> ". . . **Before that Convention, such a tract of land would be worth only its usage for agricultural or fishing purposes** with the burden of the flowage actually there and the most which could be vaguely hoped for would be the removal of the flowage and the resultant use, for the above purposes, of the overflowed land. With the Convention came the certainty of compensation for the overflowed land. To the extent of this compensation, the value of the lands would be increased to the owner and, therefore, would be a factor in sales price thereof. **Beyond this, there is no vestige of reason for an increase.** Even if owners and buyers might actually have thought that this compensation would include an

> enhancement from use for flowage purposes, there was no justification in law for such view. **Such thought could spring only from the Convention** which had in mind this very improvement and values arising because of the particular improvement cannot be included in compensation." (R. ft. 427, 428.)

In our discussion under Point (A), ACTUAL USE, we pointed out in some detail the portions of the record which completely disprove the foregoing assumptions of fact. Accordingly, we will only enumerate them here.

1. The majority conclusion that

> "such use is too remote and speculative to have such effect in fact (to increase market price) (R. 428).

is absolutely disproved by offered evidence that **in fact market prices were actually increased**; and the court's statement that

> "we cannot think that such an eventuality held that degree of probability or possibility which could affect the value of these lands and be an influence . . . affecting . . . the minds of sellers and buyers thereof in arriving at a fair price therefor"

is not only disproved by the evidence but is immaterial, for, as pointed out in the dissenting opinion,

> "nor is it material whether or not there **should have been logically** no element of value in the lands based upon adaptability and use for reser-

voir purposes until the titles were unified." (R. 437.)

2. As pointed out, the majority assumption that "before the Convention such a tract of land would be worth only its usage for agricultural or fishing purposes"

is disproved by the record, and is unsound in reason, because **by far the largest areas of these shore lands were not used for "agricultural or fishing purposes." They were used exclusively for water storage purposes, and were actually bought and sold for a higher price on that account. It was upon their use for storage that their market value was based.**

3. By the same facts and reasoning, the court's conclusion that beyond the promise held out to Petitioners by the Treaty of 1925 "there is no vestage of reason for an increase" in market values, is entirely erroneous, and disproved by the record.

4. Furthermore, the assumption that

"even if owners and buyers might actually have thought that this compensation would include an enhancement from use for flowage purposes, there is no justification in law for such view,"

begs the very question to be proved. Whether there was "no justification in law for such view" is the question now before this Court for determination. A statement of the desired answer may not serve as the

major premise in a process of reasoning to prove the accuracy of the conclusion.

But the Court's conclusion is erroneous for still another reason, because, as we have pointed out, the fact that Petitioners could have obtained a higher price for their lands on the market, during a period of more than ten years before the condemnation, would be of value to them, regardless of whether such market price was justified, or not. **The law does not require that there be a legal or economic justification for the market. The law is satisfied with ascertaining what the market value actually was.** If the law were otherwise, the recovery of damage for breach of contracts for the sale and delivery of securities and property during the past five years would be attended with much difficulty and uncertainty.

5. Likewise the majority conclusion that any thought or expectation of an increase in price "could spring only from the Convention" (of 1925) is squarely disproved by the record, which proves, without contradiction, that as early as 1916, even before the report of the International Joint Commission was filed, these lands were actually bought and sold for higher prices because of their adaptability and use for storage purposes. The majority opinion is clearly in error when it concludes that the higher prices which were paid for these lands, ten years before the Convention of 1925,

> "could spring only from the Convention which had in mind this very improvement."

2. Examination of Conclusions of Law contained in the majority opinion compared with legal principles applied in other cases to similar facts.

The decision of the Circuit Court of Appeals is based on the following statement, in the majority opinion, regarding the law:

> ". . . Also, and particularly pertinent to our case, where **the use depends upon assembly of numerous tracts** separately owned **the probability of uniting or acquiring all of them** necessary to the use is an important—maybe a controlling —consideration in determining **whether the use is 'too remote and speculative to have any legitimate effect upon the valuation' (McGovern v. N. Y., 229 U. S. 363, 372** and see **United States v. Chandler-Dunbar Company, 229 U. S. 53, 80)**, and 'in estimating that probability the power of effecting the change by eminent domain must be left out' **(McGovern v. N. Y., 229 U. S. 363, 372, and see United States v. Chandler-Dunbar Co., 229 U. S. 53, 80-81)**. The things we deem material to bear in mind in the foregoing statement of the law are that existing uses influence values; that potential uses are not considered if they are remote and speculative; **that they are remote and speculative if the use depends upon the union of numerous tracts,** variously owned, **and such union is improbable** and that **in determining such probability the power of eminent domain must be excluded."** (R. 426).

It will be helpful in analyzing the foregoing statement to inquire:

1. Whether the principles stated, when compared with the facts in the record, would support the court's judgment.

2. Whether the statements contained in the majority opinion conform with the law as enunciated by this court.

In applying the principles to the facts in the record the following conclusions would appear proper:

(a) As to these shore lands, it is **not a fact** that **"the use depends upon assembly of numerous tracts."** Their use has been an accomplished fact for thirty years. As stated in the dissenting opinion:

> "unification of titles may have been somewhat impracticable, but co-operation between the various owners including the United States and Canada (even by acquiescence) as to maintenance of lake levels was not impossible, but an established fact . . ." (R. 437).

(b) **"The probability of uniting or acquiring all of them,"** that is, all of the tracts and titles, was practically a certainty. Physical unification was an accomplished fact. The lands were valueless except for storage. They have been flooded for thirty years. The owners held them for sale for storage purposes. The majority opinion states that the owners had no right of redress on account of the trespass, that they

were "helpless." If such were the fact, the court which so found could hardly hold, as a matter of law, that, without eminent domain, acquisition and unification of the properties would be impossible. Especially could it not be so held in view of Petitioners' offers to prove by the witnesses **Meyer, Williams and Newton** that unification by private enterprise would be entirely practicable, and would have been accomplished except for the action taken by the Government.

(c) **"Whether the use is too remote and speculative to have any legal effect upon the value"** cannot be in question on this record. It is proved without contradiction in the record, that **the market value of these and similar lands was in fact increased.** It would appear that, **where it is proved that a certain fact or condition has been instrumental in sustaining a higher market for lands throughout a period of fifteen years, the legitimacy of its effect should no longer be open to question on an inquiry into the fact as to what the market value actually was.**

Even assuming the principles stated in the majority opinion to be the law, their application to the undisputed facts in the record would require a reversal of the judgments.

But we believe that the majority opinion does not accurately state or apply the law as laid down by this Court.

In a few words, the majority opinion states its theory and understanding of the law on which it af-

firmed the judgment of the District Court. The statement is:

> ". . . That potential uses are not considered if they are remote and speculative; that they are remote and speculative if the use depends upon the union of numerous tracts, variously owned, and such union is improbable and **that in determining such probability the power of eminent domain must be excluded.**" (R. 426).

Petitioners agree that potential uses should not be considered if they are remote and speculative and if they cannot be used without the unification of numerous tracts of land which is improbable. But that formula does not justify the exclusion of Petitioners' evidence in these cases for two reasons:

1. Because the union of Petitioners' lands is not improbable; it is an accomplished fact; and

2. Because the use is "actual" and not merely "potential."

But the question now under discussion is the accuracy of the statement of law upon which the majority decision rests:

> "That in determining such probability (the probability of uniting numerous tracts) the power of eminent domain must be excluded."

That is, the majority decision holds in effect, that **if it is impossible to unify variously owned tracts**

of land without the exercise of eminent domain, the peculiar adaptability of the land for a special use must be disregarded in determining its market value.

Petitioners conceive this statement of the law to be without support either in reason or in legal authority.

What reason could there be for such a rule?

If A owned a piece of land peculiarly adapted to grow celery, and acknowledged to be worth $500.00 per acre for that purpose, but was worth only $100.00 per acre for general agriculture, and if B owned all the adjoining land and desired to build a mill and a mill pond which would flood both tracts, what price must B pay for A's land? If A sells voluntarily will his compensation be the same as if he refuses to sell and B is required to exercise eminent domain? If A refuses to sell, unification becomes impossible except by eminent domain. Obviously the number of ownerships does not determine the difficulty of unification, nor does it determine the necessity of exercising eminent domain. It might be easier to acquire one thousand tracts from owners willing to sell than to acquire one tract from A who is not willing. It may be possible to acquire the one thousand tracts without eminent domain while it may be impossible to acquire A's tract except by the exercise of it. However, the necessity of exercising eminent domain is largely a matter of price. Usually any property can be acquired for a price. As a practical matter, emi-

nent domain is a protection against excessive prices.

Would anyone claim that A should be paid one price if he conveys without condemnation, but that he should be paid a smaller price if his land is taken from him by eminent domain? What reason can there be for permitting eminent domain to destroy market value, or to prohibit the owner whose land is condemned from proving the adaptability of his land for useful purposes, and the market value of it resulting from such adaptability? Yet this is the inevitable result of the rule announced in the majority opinion.

Application of that rule has deprived Petitioners of the right to prove the adaptability and use of their lands for reservoir purposes, although its market value was based entirely upon such adaptability and use.

Application of the rule stated in the majority opinion required the jury to consider only the adaptability and use of Petitioners' lands for agriculture, when it was undisputed that said lands had no adaptability for that purpose. Application of that rule required the jury to disregard the adaptability and actual use of Petitioners' lands for reservoir purposes, when it was admitted that the lands were adapted for no other purpose, and had never served any other use.

Something must be wrong with a rule which produces a result so unreasonable and unjust.

The answer is that whether unification of titles is accomplished by eminent domain or by voluntary conveyance has no bearing on whether special adaptability and use may be considered in determining market value.

The inquiry is as to market value, not as to means of unification. The question is, what was the land worth independently of the plan and activity of the taker? **The market value, excluding the activity of the taker, must be paid. No value contributed by the plan or activity of the taker may be added, and it matters not whether acquisition is by voluntary conveyance or by eminent domain.** Any increase in the market value caused by the taker must be excluded, but any market value which the land possessed by virtue of its location or other inherent qualities entirely independent of the taker, must be paid. **Every fact or circumstance which is independent of the taker must be considered if it actually has affected market value, or is such as would be likely to do so.**

We believe that the basic principle here stated does justice between the parties, and that it is logically and economically unassailable. It has been applied frequently in the decisions of this court. A case which clearly illustrates the principle and applies it is

New York v. Sage
239 U. S. 57.

In that case the Commissioners found the value of the real estate to be $7,624.45, and allowed the

further sum of $4,324.45 "for reservoir availability and adaptability." There was no finding of any increase in the market value of the real estate because of said "reservoir availability and adaptability." This court disallowed the sum which the Commissioners added over and above the fair market value. Mr. Justice Holmes, speaking for this Court, said (pp. 60-62):

> "Upon an inspection of the record it appears to us, as the language of the commissioners on its face suggests, that their report does not mean that the claimant's land had a market value of $11,948.90 — that it would have brought that sum at a fair sale—but that they considered the value of the reservoir as a whole and allowed what they thought a fair proportion of the increase, over and above the market value of the lot, to the owner of the land, subject to the opinion of the court upon the point of law thus raised. Upon that point we are of opinion that they were wrong.
>
> * * * It is said that in this case there was testimony that the lot was worth more than the total allowed. But the only explanation of the separation of items by the commissioners is that they were not prepared to say that the market value of the lot was $11,948.90, seeing that the claimant bought it a few days before for $4,500, but that they thought the **additional value gained by the city's act** should be taken into account and shared between the city and the owner

of the land—a proposition to which we cannot assent."

The majority opinion cites and relies upon

McGovern v. New York
229 U. S. 363

in support of its judgments.

The controlling question in the **McGovern case** was whether the proceedings in the Courts of New York constituted "due process of law." This Court did not approve or disapprove the findings of the Commissioners. It merely held that plaintiff in error had not been denied "due process of law." We find nothing in the **McGovern case,** when considered in connection with its peculiar facts, which in any way justifies the exclusion of Petitioners' evidence from consideration in the instant cases. Here Petitioners' lands possess inherent adaptability for reservoir purposes. Such inherent adaptability was in actual use at the time of condemnation, and had been so used for thirty years, and an actual increase in the market value of the lands had resulted therefrom. **The market value could not be determined without considering the inherent adaptability and actual use of the lands.** There is a taking of Petitioners' lands with their inherent adaptability and their consequent market value. In the **McGovern case** this court said that Petitioners would be entitled to recover the **market value of what was taken from them.** The court said (p. 372):

> "The plaintiff in error was entitled to be paid only for **what was taken from him as the titles stood,** and **could not add to the value** by the hypothetical possibility of a change unless that possibility was considerable enough to be a practical consideration and actually to influence prices. **Boston Chamber of Commerce v. Boston, 217 U. S. 189, 195.** In estimating that probability the power of effecting the change by eminent domain must be left out."

It is this last quoted sentence upon which the majority opinion mainly rests.

It should be kept in mind that, in the instant cases, all that Petitioners sought to prove and to have considered by the jury, was **"what was taken from them as the title stood"** before these proceedings were commenced. The **McGovern case** recognizes their right so to recover.

All that the **McGovern case** excludes is the attempt to **"add to the value** (which the lands possessed **as the title stood**) by the hypothetical possibility of a change." The majority decision excludes evidence of facts and circumstances which, in fact, increased market values "as the titles stood," and for a continuous period of more than 10 years before any attempt was made to unify the titles.

There is no showing in the record that the Government's proceedings to effect a change in these

titles has in any way increased market value. Indeed, it is doubtful whether any such showing could be made, for the lands possessed the same inherent adaptability, and served identically the same use, **"as the title stood,"** as they will possess and serve after the Government acquires the easement. **It is the adaptability and use of these lands for reservoir purposes,** and **not the condition of the titles, which gave them their market value. Notwithstanding the condition of the titles, these lands had a market value based upon their special use and adaptability. This, Petitioners had a right to prove. That right was denied.**

The evidence which was excluded, and which the jury was instructed to disregard, did not tend to **"add to the value by the hypothetical possibility of a change,"** but it did tend to prove the market value of **"what was taken from them as the title stood,"** and for this, the **McGovern case** holds that "plaintiff in error . . . was entitled to be paid."

The facts were substantially the same in the **Sage** and the **McGovern** cases. Our understanding of the law as applied by this court to the facts in those cases is justified by the statement of the court in

C. G. Blake Co. v. U. S.
275 Fed. 861
Aff'd. 279 Fed. 71

which case was later cited with approval by this court in

U. S. v. New River Collieries Co.

262 U. S. 341.

The Court in the **C. G. Blake case** construed the holding in the **Sage case,** as follows (p. 866):

> "The question under consideration was whether the commissioners, in fixing compensation for property appropriated by the city for reservoir purposes, were justified in **adding to the sum allowed for the land and building** a further amount 'for reservoir availability and adaptability.' **No question as to the general condition of the real estate market was before the court.** The court found that the commissioners had considered the value of the reservoir as a whole and allowed a fair proportion of the increase **over and above the market value of the lot.** It was held that adaptability for the purposes for which the land could most profitably be used might be considered, but only so far as the public would have considered it if the land had been offered for sale in the absence of the city's exercise of the power of eminent domain. * * * The fair market conditions there referred to seem to have been **those conditions of availability of the land itself** and the title thereto which would have affected its sale to one of the public, as distinguished from **those conditions supplied by the city by the very exercise of the right of eminent domain."**

A similar construction of the **McGovern case** was made by the Supreme Court of Maryland in

Brack v. Mayor, etc. of Baltimore
125 Maryland 378
93 Atl. 994
Ann. Cas. 1916 E. 880

where the Court said (pp. 996-997):

"An examination of the decisions rendered in that case by the Courts of New York and by the Supreme Court of the United States, has satisfied us that they are not opposed to the general trend of authority on the subject under inquiry . . . In that case **the landowner did not attempt to prove that the value of the property had been increased by its availability for reservoir purposes before the commencement of the condemnation proceedings.** It was pointed out that there was no evidence 'of any circumstance by which the value of the parcel in question, as a part of a natural reservoir site, could be estimated or determined.' In the absence of such evidence, it was held that the owner had received the benefit of everything which enhanced the value of his property **except the increase caused by its appropriation for the use of the city.** . . . It is apparent, therefore, that the case last cited is consistent with the theory of the other decisions referred to that **any particular capability which actually enhances the value of the property, independently of the demand created by the condemnation, should be considered**

in the estimate to be made of the market value which constitutes the measure of compensation."

The controlling principles are pointed out in a discussion of an early New York Case,

In Re Gilroy
85 Hun. 424
32 N. Y. S. 891

contained in a later New York case, involving lands and circumstances similar to those contained in the **McGovern** and the **Sage** cases.

In Re Board of Water Supply of City of New York
58 Misc. 581
109 N. Y. S. 1036, 1049

This case had to do with the condemnation of lands in the Ashokan reservoir for the city of New York. The commissioners excluded evidence tending to prove the value of the Ashokan reservoir to the city of New York. The Supreme Court of New York affirmed the action of the Commissioners, and, in distinguishing **In re Gilroy,** pointed out clearly the distinction, running through all the cases, between **values inherent in the land** and **values contributed by the exercise of eminent domain.** The Supreme Court of New York said:

"In order to understand this case (In Re Gilroy) it is necessary and essential to understand the facts that were before the court. The land sought to be condemned by the City of New York

was a portion of Lake Gilead, in Putnam County . . . From that time (1841) on down until the commencement of the proceedings to acquire the remainder of Lake Gilead in 1891, for half a century, the City of New York had constructed the large Croton Dam, which forms the Croton Lake, on the Croton River, about ten miles downstream from Lake Gilead, and from time to time the city had purchased and leased various lakes and ponds, and constructed dams and reservoirs thereon, . . . so that some fifty years thereafter, when this proceeding came to be started, **it became fairly well known that lakes and ponds of fresh water were desirable property to hold in that section above the Croton Reservoir, as it was likely to be desired by the City of New York, and a good profit realized thereon, and a market value for such property was created.** The City of New York had also used for some time the water of this Lake Gilead so that at the times these proceedings were commenced, before and while they were pending, this desire on the part of New York City for an addition to its water supply, **it can easily be seen, had affected the market value of properties of that kind.** Reading the decision in the light of the questions before the Court, we **can see that what was shut out by these Commissioners was the market value of this property, a value which had grown up with the years, and which had increased by the parties holding this lake for this long term.** All the City of New York had to do, upon acquiring that

lake, was simply to raise the gates, and the water flowed in the natural stream down and into the large Croton Reservoir, so that the conditions there were entirely different from what the conditions are here."

The distinction pointed out in the above language of the Supreme Court of New York applies to and accurately describes the controlling characteristics descriptive of Petitioners' lands. **"What was shut out," by the trial court, "was the market value of this property, a value which had grown up with the years." A market value based entirely on the adaptability and use of these lands for reservoir purposes.**

In the **McGovern case,** Mr. Justice Holmes speaking for this court, cited with approval

Sargent v. Merrimac
196 Mass. 171
81 N. E. 970
11 L. R. A. (N. S.) 996

In the **Sargent case** Judge Loring, who wrote the opinion for the Supreme Judicial Court of Massachusetts, said (p. 971):

"The market value to which the petitioner was entitled was made up of the value of the land apart from its special adaptability for water supply purposes, **plus such sum as a purchaser would have added to that value because of the chances that the land in question might be some**

day used as a water supply. Moulton v. Newburyport Water Company, 137 Mass. 163."

It is significant that in the **Sargent case** the trial court instructed the jury as follows (p. 972):

> "I said that you could consider the evidence of the uses to which this property was adapted, all the uses. Upon that, in connection with those uses, you can take into account in the Sargent case the fact that there was or was not, as you find it to be from the evidence, a supply of water upon the premises. **If that would give an added value to the property in the mind of any purchaser in the open market and in the mind of any seller in the open market, you could take that into account; but you could not use it to mark up a price beyond the fair market value of the property. . . . If the fact that it was adapted to use as a water supply,** if you find that to be a fact, **would have affected the mind of anybody in dealing with the property, that you can take into account,** but that is the extent to which you can go, and you may think that that, practically, as the land was situated, did not affect its value at all. On the other hand, you may think that it added to or decreased its value."

A comparison of the trial court's instructions to the jury in Petitioners' cases with the trial court's instructions in the **Sargent case,** which case was cited with approval by this court in the **McGovern case,** will serve to point out the error in the instant cases.

District Judge Sanborn's instructions to the jury in the cases at bar were:

> "But you will not make an award based on any claim for reservoir value. I have held that under the law the value of these lands could not be based upon the use of the lake and its shores for reservoir purposes. It is, as I understand it, conceded that the only other use for which these lands are suited, with the exception perhaps of Mr. Olson's tract, is for agricultural purposes, or purposes relating to agriculture, so that it is for this purpose that you are to value these lands.
>
> . . .
>
> **"As you understand, at the outset of this case perhaps the most controverted question was the question as to whether in determining the value of these lands, any added value could be accredited them because of the fact that they formed the boundaries or shores of what would be a very large reservoir, which would be used in part for the benefit of power companies on the Winnipeg River. I have held that as a matter of law, that question does not come into this case under all of the circumstances, so that you have absolutely nothing to do with it, and will not consider it in any way in your deliberations."** (R. 130.)

The principles stated in the **Sage** and **McGovern cases** and contained in the instructions of the trial court in the **Sargent case** were applied and reaffirmed by this court in

U. S. v. Chandler-Dunbar Water Power Co.
229 U. S. 52

where this court overruled the exception taken by the Government to the exclusion of the availability for lock and canal purposes as an element of value of the land taken. In that connection this court cited with approval

Shoemaker v. United States
147 U. S. 282

and quoted a portion of the instruction given the Commissioners in that case, as follows (p. 78):

> "In the court below the commissioners were instructed to estimate each piece of land at its market value, and that, 'the market value of the land includes its value for any use to which it may be put, and all the uses to which it is adapted, and not merely the condition in which it is at the present time, and the use to which it is now applied by the owner; . . . **that if, by reason of its location, its surroundings, its natural advantages, its artificial improvement, or its intrinsic character, it is peculiarly adapted to some particular use—e. g., to the use of a public park—all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation.**' The court approved this instruction."

The trial court's instructions in the instant cases are in direct conflict with the instructions approved

by this court in **Shoemaker v. U. S., U. S. v. Chandler-Dunbar Co., McGovern v. N. Y.,** and in **Sargent v. Merrimac.**

In speaking of some of the cases above cited and relied on in the majority opinion, Judge Booth, in the dissenting opinion, said:

> "The cases of **United States v. Chandler-Dunbar Company, 229 U. S. 53; McGovern v. New York, 229 U. S. 363;** and **New York v. Sage, 239 U. S. 57,** relied upon by the appellee, lend support rather to the contentions of appellants in the cases at bar, when comparison is made between the facts disclosed in those cases and the facts disclosed in the cases at bar." (R. 438).

IV. CONCLUSION FROM ANALYSIS OF REASONS ADVANCED IN THE MAJORITY OPINION, FOR NOT APPLYING THE GENERAL RULE TO PETITIONERS' CASES.

From the foregoing analysis and examination of the decisions of this court, and the undisputed facts contained in the record, we believe that the following conclusions are fair:

A. Reasons advanced in the majority opinion, when compared with the undisputed facts in the record, are found to be contrary to the facts and entirely unsupported, because the record establishes, without contradiction, that the market value of Petitioners' lands was effected and increased on ac-

count of their special adaptability and actual use; that such increase in market value occurred before and entirely independently of the acts or plans of the Government in acquiring the flowage easement; that neither the use of said land nor the increase in market value was dependent upon or caused by the act or plan of the Government in unifying titles, but that both the use and the increase in market value occurred many years before the Government undertook, or even decided, to acquire the flowage easements. That there was potential competition and demand for the flowage rights, and that such flowage rights would have been acquired by one or the other of the groups of competing power companies if the Government had not undertaken to acquire them. **Especially, that Petitioners' evidence,** which was excluded and eliminated from the consideration of the jury, **did not tend to prove any added value contributed by the plan or activity of the Government,** but, on the contrary, **tended to prove the market value, existing not only at the time of condemnation,** but which existed for many years prior thereto, and which was based upon the inherent adaptability and actual use of Petitioners' lands for reservoir purposes. **What was excluded from consideration was the market value of Petitioners' lands.**

B. The reasons advanced in the majority opinion are contrary to the decisions of this court.

C. The reasons advanced in the majority opinion are inconsistent with each other, in that the

majority opinion justifies the **exclusion of actual use** by holding that such use was unlawful, and **that Petitioners had no rights of redress and were "helpless"** in the matter, while the majority next justifies the **exclusion of special adaptability** for potential use **by holding that the exercise of eminent domain is necessary to unify the titles,** and "where the use is possible only through the exercise of that power 'it must be left out' in estimating the probability of such a use as affecting sales value and compensation."

Both of these propositions cannot be true. Either the property owners were not "helpless" and did have some right of redress, or the exercise of eminent domain was not necessary to the unification of titles.

If the property owners were helpless, then unification could be accomplished at will, without exercise of eminent domain, and there would be no cause, according to the reasoning of the majority opinion, to exclude adaptability for potential use.

If the exercise of eminent domain was necessary, in unifying the titles, it must be because the property owners were not helpless, but had enforcible rights which could not be taken from them except by the exercise of eminent domain, in which case, according to the reasoning of the majority opinion, there would be no justification for excluding evidence of the actual use of their lands.

Either the reason advanced for excluding actual use of the lands from consideration, or the reason ad-

vanced for excluding adaptability for potential use, must be untrue. It is respectfully submitted that both reasons are without support, either in the record or in the decisions of this court.

The judgments, therefore, should be reversed.

V. ADAPTATION OF THE GENERAL RULE TO SPECIAL FACTS AND CIRCUMSTANCES INVOLVED IN MEASURING JUST COMPENSATION.

As was intimated by **Mr. Justice Holmes** in **New York v. Sage, supra,** the general rule, as stated broadly in the earlier cases, has required further refinement in its application to special facts and circumstances which have arisen in the later cases. Without attempting to cover all possible classifications, it may be stated that the following classes of cases not infrequently occur:

(A) CASES INVOLVING LAND, TAKEN FOR PUBLIC USE, WHICH HAS NO INHERENT ADAPTABILITY FOR THAT USE; AND

(B) CASES INVOLVING LAND, TAKEN FOR PUBLIC USE, WHICH DOES POSSESS INHERENT ADAPTABILITY FOR THAT PARTICULAR USE.

Obviously in Class (A) the question of including special adaptability in estimating just compensation is not involved, and need not be considered in our

present discussion. The distinction between Class (A) and Class (B), as above stated, is clearly pointed out and illustrated in

Simpson v. Shepard (Minnesota Rate cases)
230 U. S. 352, 451

where Chief Justice Hughes, in speaking for the court, said:

> "But supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation its **fair market value** for all its available uses and purposes, **U. S. v. Chandler-Dunbar Company, 229 U. S. 53.** If, in the case of any such owner, his property **had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. Mississippi & Rum River Boom Co. v. Patterson, 98 U. S. 403; Shoemaker v. United States, 147 U. S. 282. . . .**"

We are here concerned with cases arising in Class (B).

When lands are taken for a public purpose which possess special adaptability for that purpose, such special adaptability should, or should not, be considered, in determining just compensation, according to whether such special adaptability has actually influenced, or is likely to influence, market values. Any one of three situations may arise:

The inherent adaptability may be so far removed from probability of actual use that it has not affected, and is not likely to affect, market values; or, the inherent adaptability is so likely to be in demand for use, within a reasonably proximate time, that market value would naturally and probably be affected thereby; or, the inherent adaptability has been used, and is in actual use, at the time of condemnation, and the market value actually has been influenced thereby.

Reference to a few cases illustrative of these classifications may assist in demonstrating Petitioners' rights in the instant cases.

1. The condition described in the first classification, where the special adaptability was so far removed from the probability of actual use that it would not be likely to affect market value was involved in **McGovern v. New York**, and **New York v. Sage, supra,** where this court held that the special adaptability of the lands in question was so far removed from practical use, except by the City of New York, that its effect upon market value must "be regarded as too remote and speculative to have any legitimate effect upon the valuation."

In the **Sage case,** however, this court expressly recognized that a different rule would apply if the possibility of use were such as would naturally affect market prices. The court said (p. 61 of 239 U. S.):

> "The fact that the most profitable use could be made only in connection with other land is

not conclusive against its being taken into account, if the union of properties necessary (to create the reservoir) (parenthesis furnished by counsel) is so practicable that the possibility would affect the market price. . . . The city is not to be made to pay for any part **of what it added to the land** by thus **uniting it** with other lots if that union would not have been practicable or have been attempted except by the intervention of eminent domain."

2. The condition described in the second classification, where the inherent adaptability is so likely to be in demand for use, within a reasonably proximate time, that market value would naturally and probably be affected, was involved in

U. S. v. Chandler-Dunbar
229 U. S. 53

wherein this court overruled Government's exception to an award of $25,000.00 as compensation for land possessing special adaptability for lock and canal purposes. This court, speaking through Mr. Justice Lurton, said (pp. 76-77):

"The exception taken to the inclusion as an element of value of the availability of these parcels of land for lock and canal purposes must be overruled. That this land had a prospective value for the purpose of constructing a canal and lock, parallel with those in use, **had passed beyond the region of the purely conjectural or speculative.** That one or more additional parallel canals and

locks would be needed to meet the increasing demands of lake traffic **was an immediate probability. This land was the only land available for the purpose.** It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, **it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose."** (Citing cases.)

The significance of the difference in the facts pointed out between the two classifications was made clear in the language quoted supra from **Simpson v. Shepard.** In the **Simpson case** it was indicated that a railroad right-of-way across an area devoted exclusively to agriculture would revert to the same type of land as surrounded it, and would be available only for agriculture, but, as stated in the opinion, if "any property had a peculiar value or special adaptation for railroad purposes" "that would be an element to be considered."

A case illustrating this point is

Joint Highway District No. 9 v. Ocean Shore Railroad Company,
128 Cal. App. 743
18 Pac. (2d) 413

Defendant owned a strip of land which served as a gateway through a mountain range, through which defendant had partly developed a railroad

right-of-way. Defendant then experienced financial difficulties, and the project was abandoned and finally dismantled. Plaintiff claimed that the land through this gateway had no value except as "bare land located where it was too steep to even raise goats." Defendant claimed that the land had a market value for a special use as a railroad right-of-way. The value for this special use was allowed by the California Court. At page 417 of 18 Pacific (2nd), the court said:

> "We believe it perfectly clear that certain land may be of but small value in use for one purpose and of much greater value in use for another purpose. It may therefore be said to have a different value for one purpose than for another if the word value be understood as meaning its value in use. But a given piece of land has only one market value and not a certain market value for one purpose and a different market value for another purpose. . . .
>
> ". . . This market value may be greater or less than the value in use to either the owner or the condemnor, but in the eyes of the law it is a fixed amount determined by 'the highest sum which the property is worth to persons generally, purchasing in the open market in consideration of the land's adaptability for any proven use.'
>
> ". . . Appellant seems to consider that there can be no market value unless there is an active demand, but such a rule would frequently result in depriving the owner of his property with-

out awarding him just compensation. **The mere fact that there is no one who is ready, willing, and able to purchase the property at the time in question does not mean that the property has no market value. . . . We believe that opinions on market value may be given by qualified experts based entirely upon a potential demand where the evidence tends to show a reasonable probability that purchasers for the property may be found within a reasonable time.** In passing we may state that a 'reasonable time' in cases like the present one is far greater than in cases involving ordinary land."

Another case involving facts illustrative of the second classification is

Ford Hydro-Electric Company v. Neely
13 Fed. (2d) 361
(Certiorari denied 273 U. S. 723)

where the Circuit Court of Appeals, Seventh Circuit, said (p. 362):

"The objection made to the question asked, and now urged to the testimony given by both witnesses, goes to the competency of the evidence sought and brought out; that is, to the competency of evidence as to the peculiar fitness of the land for particular purposes as an element in estimating its value. That this is proper evidence to be considered by the jury in determining the market value of the land has been often decided. . . . The evidence objected to

threw light upon the availability of the land for water power purposes and the value of such element, as bearing upon what might be paid for it by one desiring to purchase it, and thus bore upon its market value. By objecting to this evidence, plaintiff in error sought to exclude it altogether. As remarked by the trial judge, the objection went rather to the weight to be given the evidence than to its competency. **The availability of the land for the development of water power, and the value of it for such purposes, was a proper element to be considered by the jury in fixing its market value. . . .**

"The point made in the objection to the question and in the assignments of error, and pressed upon the argument here, that the witness Newton and Williams 'considered the lands as a part of a united whole, the whole consisting of all the parcels of land necessary to a completed water power development which would include the lands taken' does not impress us. The argument appears to be that, where the lands sought to be condemned are not the whole of the lands needed, but only a part thereof, the elements called by the trial judge 'raw water power value of land' and by the Supreme Court in Boom Co. v. Patterson, supra, 'its capability of being made available' for such purpose, cannot be considered at all in determining value. From the arguments of plaintiff in error we conclude that its real grievance is that the jury gave too much consideration to the element of potential

water power. **This being an element proper to be considered, it could not be excluded,** but plaintiff in error could have asked the court to instruct the jury that they should take into consideration the probability or practicability of so uniting all the lands as to make the water power appertaining to the lands of defendants in error available. The authorities cited by plaintiff in error recognize the propriety of such evidence."

Accord

Monongahela Navigation Co. v. U. S.
148 U. S. 312

U. S. v. Chandler-Dunbar Co.
229 U. S. 53, at 76

Sanitary District of Chicago v. P. Ft. W. & C. Ry. Co.
216 Ill. 575, at 583
75 N. E. 248.

3. A case involving the taking of property specially adapted to a particular use and already devoted to that use is

Monongahela Navigation Co. v. U. S.
148 U. S. 312.

That case involved the taking of certain locks and dams built and used for navigation purposes. In discussing whether the use value of these locks and dams should be considered in determining just compensation, Mr. Justice Brewer, writing the opinion for this court, said (p. 337):

"Whatever be the true value of that which it takes from the individual owner must be paid to him, before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a post office is equally true when condemnation is sought for the purpose of improving a natural highway. .... If a man's house must be taken, that must be paid for; and, if the property is held and improved under a franchise from the State, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken."

Southern Ry. Co. v. City of Memphis
126 Tenn. 267, 148 S. W. 663
41 L. R. A. (N. S.) 828
Ann. Cas. 1913 E. 153

Condemnation of Railroad property for a city park. (Page 669 of 148 S. W.):

"It (just compensation) includes every element of usefulness and advantage in the property. If it be useful for agricultural or for residence purposes, **if it has adaptability for a reservoir site** or for the operation of machinery, if it contains a quarry of stone or a mine of precious metals, if it possesses advantage of location or availability for any useful purpose whatever, **all these belong to the owner, and are to be considered in estimating its value.** It matters not

that the owner uses the property for the least valuable of all the ends to which it is adapted, or that he puts it to no profitable use at all. **All its capabilities are his,** and must be taken into the estimate."

The same principle is similarly applied in

Sanitary District of Chicago v. P. Ft. W. & C. Ry. Co.
216 Ill. 575
75 N. E. 248

In this case the court said (pp. 251-252):

"The property taken constituted part of the freight and passenger terminal of the railways of the defendants in the city of Chicago. * * * **The witnesses for the petitioner stated that they took into account the use to which the property was put and its adaptability to such purpose, and that it had a market value, which they stated.** But it is perfectly clear from their testimony that none of them had any definite idea of the value of the property to the owner in connection with the use to which it was put. Their estimates of value per square foot were on the basis of ordinary real estate sold in the market in that way. **The witnesses for the defendants did not know the market value, by the square foot or otherwise, of property in the city of Chicago, and had not dealt in real estate in that way; but they knew the value of the property as a freight terminal, and were fully qualified to give their**

opinions on that subject. The jury were called upon to determine the value of an integral portion of a freight terminal which was a part of extensive railway systems, and the damage to the residue, and it was property which had no market value. . . . **It is a matter of common knowledge that such property as this and devoted to such a use is not bought and sold in the market or subject to sale in that way, and that such property has no market value in a legal sense. The property being devoted to a special and particular use, the general market value of other property was not a criterion for ascertaining compensation, although it might throw some light on the actual value."**

VI. STATEMENT OF CONTROLLING PRINCIPLES DETERMINING CONSIDERATION OF SPECIAL ADAPTABILITY AND USE IN ESTIMATING JUST COMPENSATION.

An examination of the cases and of the controlling principles applied to facts similar to those now before the court points to the following generalization: Any inherent adaptability for a special use, possessed by land taken for public purposes, must be considered in determining just compensation, provided such inherent adaptability exists and is recognized independently of the plan or activity of the taker, and provided such special adaptability has actually affected the market value of the land, either because it is actually used for a special purpose, or

because its use for such purpose is so probable that it actually has affected market value, or would be likely to do so. The compensation awarded may include only the amount or extent to which the market value has been increased by such inherent adaptability for a special use, and may not include any amount which may have been added to the market value by the plan or activity of the taker. The well considered cases uniformly support this generalization. The following cases, in addition to those above referred to, are illustrative:

What is proper to consider in determining market value was clearly stated by Mr. Justice Butler in

Brooks-Scanlon Corp. v. U. S.
265 U. S. 106, 123, 125, 126.

"It is the sum which, considering all the circumstances—uncertainties of the war and the rest—probably could have been obtained for an assignment of the contract and claimant's rights thereunder; that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy. . . .

". . . Determination of just compensation is to be based on the fact that claimant's contract and its rights and interests thereunder were expropriated, and that it is entitled to have their value at the time of the taking. The value of such ships at the time of requisition, and the then probable value at the time fixed for delivery, the contract price, the payments made and

to be made, the time to elapse before completion and delivery, the possibility that by reason of the Government's action in control of materials, etc., the contractor might not be able to complete the ship at the date fixed for performance, the loss of use of money to be sustained, the amount of other expenditures to be made between the time of requisition and delivery, together with other pertinent facts, are to be taken into account and given proper weight to determine the amount claimed lost by the taking (Citing Minnesota Rate cases, 230 U. S. 352, 451 and other cases) that is, the sum which would put it in as good a position pecuniarily as it would have been in if its property had not been taken."

Weiser Valley Land & Water Co. v. Ryan
(C. C. A. 9th Cir.)
190 Fed. 417, 423

"All the uses to which the property is available, the most advantageous as well as the less advantageous, should be taken into view, and the general estimate of the market value should be deduced; not what any one person would give for it for his particular use, but what could probably be obtained for it if a sale was desirable and a purchaser sought, applying the ordinary business methods of finding a purchaser and disposing of the property."

Niagara, Lockport & Ontario Power Co. v. Horton
231 App. Div. 402
247 N. Y. S. 761, 764-765.

Proceeding in condemnation to acquire property for water power purposes.

"The commissioners concluded that the witness had adopted an erroneous theory of damages and struck out, not only his answer that the land in question had a market value of $269,000, but all of his testimony. This was error. To be sure, if the defendants mean to claim that the value of defendants' land is conclusively 'determined' by the proportionate share which defendants' land contributes to a complete development built upon, and by that use of defendants' land combined with plaintiff's land, such claim is not supported by the authorities. * * *

"But defendants are entitled to the **fair market value of their land for its highest and best available use.** And this is true, even though that best available use be use in connection with other lands, whether owned by defendants or by plaintiff or by strangers to the parties. The defendants are not entitled to have for their land what it may be worth to the plaintiff, nor what it would damage plaintiff not to be able to obtain it. **They are entitled to what it is worth on the market for the best use to which it is adaptable.**

"And when a witness, duly qualified as an expert, to give evidence on the question of value, gave his opinion as to value, his evidence should not have been stricken out, but should have been considered for what it was worth, in view of all

that he said in regard to the method by which he arrived at his conclusion, and keeping in mind the true measure of damages."

Gearhart v. Clear Spring Water Co.
202 Pa. St. 292
51 Atl. 891

Proceedings to condemn land for a reservoir. The tract was part of a natural basin.
(pp. 891-892.)

"The attempt on the part of the defendant at the trial was to limit the proofs to the value of farm land in the vicinity, on the theory that this piece of land had no other value, as the defendant owned or had obtained options on the land which surrounded it, without which this piece could not be used in the building of a reservoir. . . . **Here was a new use which created a market for land, with which its value for cultivation had nothing to do. The location alone fixed the value.** Whether the land was available for the use testified to was a question of fact, and the **argument directed to the court against the admission of the testimony should have had great weight with the jury in determining the value."**

Cited with approval in

Wadsworth v. Mfctrs.' Water Co.
256 Pa. St. 106
100 Atl. 577

Edwards v. City of Cheyenne
19 Wyo. 110,
114 P. 677, 689

"The fact that the city required the land for the purposes of erecting a dam thereon would not affect the question. **Is the land so situated and the demand for dam and reservoir sites** for power and irrigating purposes in the particular locality **so great or probable as to enhance the market value?"**

Accord

U. S. v. Boston, C. C. & N. Y. Canal Co.
(C. C. A. 1st Cir.)
271 F. 877, 893

Union Electric Light & Power Co. v. Snyder Estate Co.
65 Fed. (2d) 297

Emmons v. Utilities Power Co.
82 N. H. 181
141 Atl. 65

San Diego Land & T. Co. v. Neale
8 Calif. 50
25 Pac. 977

Alloway v. Nashville
88 Tenn. 510
13 S. W. 123

City of Stockton v. Vote
76 Calif. App. 369
244 Pac. 609

Cochrane v. Commonwealth
175 Mass. 299, 302

"When an injury is done to property which is not commonly bought and sold, and a case arises in which the amount of that injury must be ascertained, it is proper to allow testimony to be given of its value **for the special purposes for which it is used,** and to allow that testimony to be given by persons who show themselves qualified to testify thereto from knowledge derived from experience in their own business in which they have dealt with similar property. . . .

". . . **To exclude such evidence would be to deny to the owner the power of proving the real value of that property;** no one can testify to that value by knowledge derived from the sale of lands in the neighborhood; they are not similar lands; nor by sale of mill sites for such purposes, for mill sites are not commonly bought and sold. **Evidence of the value of the property as a mill site for such purposes, given by persons who have knowledge thereof derived from experience in that business, must be admitted from the necessity of the case."**

THE ENGLISH AND CANADIAN LAW ALLOWING CONSIDERATION OF SPECIAL ADAPTABILITY ACCORDS WITH THE DECISION OF THIS COURT.

Cedar Rapids Mfg. & Power Co. v. LaCoste
(1914) App. Cas. 569
30 T. L. R. 293

Appeal from the Superior Court of Quebec, House of Lords and Privy Counsel, L. L. Dunedin, Atkinson & Shaw.

Expropriation of two islands and other property in the St. Lawrence River. The commissioners had allowed only agricultural value. The Superior Court of Quebec set aside the commissioners' award and allowed the value of the islands to the taker.

The Privy Council held that the proper measure of damage was the market value of the islands in view of their adaptability for a special use.

Lord Dunedin, for the Privy Council, said:

"The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England. . . .

"Where, therefore, the element of value over and above the **bare value of the ground itself** (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking, . . . the value is not a proportional

part of the assumed value of the whole undertaking, but is merely the price, **enhanced above the bare value of the ground,** which possible intended undertakers would give. . . .

* * * * *

"Now, with regard to the Ile Aux Vaches and the reserved water rights, it seems possible that there may be some value **over and above the bare value.** If the situation be naturally favorable to the establishment of power works like those of the appellants, then it is possible that the respondents and others might have been prepared to offer an enhanced value on this account, taking the chances of a situation in which they might or might not obtain the necessary parliamentary powers to work out a commercial scheme. But the value emerging through a grant of such powers having been actually given can not, after the event, be taken into account."

In re Arbitration between
Lucas and Chesterfield Gas & Water Board
1 L. R. K. B. D. (1909) 16, 21-22

Condemnation of land for a storage reservoir. Counsel for the Water Board argued:

"The circumstances of the case are such as to prevent any special adaptability of the claimant's land for the purpose of the construction of a reservoir forming an element in the value of the land upon an assessment of compensation. . . .

there is no reasonable possibility of the owner of the land being able to avail himself of its suitability for the purpose. . . . Under the circumstances no one could be a competitor with the Water Board for the acquisition of this land for the purposes of a reservoir; the Board is the only possible purchaser for that purpose."

Buckley, L. J., in reading the judgment of the Court said (pp. 35-37):

"The frank cynicism of the argument which the appellants have the courage to address to the Court has occasioned me surprise. I hope I do not go too far when I say that the argument can only be seriously advanced by a speaker who studiously shuts his eyes to the immorality of its substructure. . . . They contend that where one of the three is in fact desirous of using the land for that special purpose, and has in fact obtained from the legislature compulsory powers to enable him to do so, he can deprive the other two of the special value arising from the adaptability, and that upon the ground that the special purpose cannot be effectuated without his consent. They say that they went to the legislature and obtained compulsory powers for a special public purpose, and that in fixing the fair value to be paid for the exercise of their compulsory powers they are entitled to say that the special purpose cannot be carried out, because they do not assent to the land being used for that purpose.

* * * * *

"The facts here are that not only is there a reasonable possibility of the site coming into the market, but that the site is wanted for the particular purpose, and is being acquired under compulsory powers for that purpose. **The land is so situated in proximity to the reservoirs already existing that within a reasonable time it will be reasonably certain that it will be required for this special purpose, with the result that it has acquired an enhanced value. That was a matter for the umpire to take into consideration.** To effectuate that purpose the Board must necessarily concur so far as they are owners of part of the site. In this state of things there is nothing to exclude the element of adaptability."

Accord

In re Arbitration between the Mayor of Tynemouth and Duke of Northumberland.
The Law Reporter, L. T. R. 89 N. S. Sept. 1903 to Feb. 1904, page 557.

VII. MULTIPLICITY OF OWNERSHIPS, INTERNATIONAL RELATIONSHIPS, AND DIFFICULTY OF UNIFICATION, AND OTHER FACTS WHICH MIGHT DETRACT FROM MARKET VALUE, DO NOT EXCLUDE ADAPTABILITY AND USE FROM CONSID-

ERATION. ALL FACTS, FAVORABLE AND UNFAVORABLE, SHOULD BE CONSIDERED.

The decisions of this Court have repeatedly emphasized that the ultimate question for determination here is, what was the market value. The factors and relationships which effect market value are material only insofar as consideration of them may assist in determining what the market value actually was. Courts, wisely, have declined the impossible task of determining what the market value logically or legitimately should have been at any given time. They have inquired only what was the market value, in view of all the facts and circumstances which in any way affected it.

That the lands border on international water does not change the ultimate question nor alter the method of consideration by which the question may be answered. **(U. S. v. Chandles-Dunbar Co., supra; Cedar Rapids Mfg. & Power Co. v. LaCoste, 30 T. L. R. 293, supra.)** Even the uncertainties of war do not alter the method of determining just compensation, but must be taken into consideration. **(Brooks-Scanlon Corp v. U. S., supra).**

Adverse factors, such as multiplicity of titles, international relationships, difficulty of unifying titles, and similar considerations, emphasized in the majority opinion, doubtless tend to depress market values, but there is no justification for holding that

these adverse considerations make it improper to consider the favorable factors which, in spite of all the adverse factors, have actually increased the market value.

It being conceded that the ultimate question is, what was the market value, and it being proved, without contradiction, that the market value of these lands used for storage was higher than the market value of similar lands for agriculture, why is it proper to consider the deterent and depressing factors, such as difficulty of unification, if it is improper, as the majority decision holds, to consider the favorable factors, such as actual use and inherent adaptability, which admittedly have increased market values? No reason has been suggested for giving controlling significance to the one group of facts and circumstances and competely disregarding the other.

We have pointed out above that the unification of titles is unimportant in determining the question here under consideration, because of the prior use which had been made of the lands, and the fact that all landowners were anxious to sell their property for the legitimate completion of the storage reservoir, and also because there was an admitted increase in the market value of the lands, notwithstanding the fact that legal titles were not yet unified.

There is the further consideration that all the lands necessary for the storage reservoir had been devoted to that use, and had already been unified

in fact through the prior use for reservoir purposes. Where physical unification is an accomplished fact, so that the actual use of the land is made possible, and market values have been increased by such physical unification and use, the problem of unifying the legal titles is not controlling, and is in fact of but little significance. As stated by the Supreme Court of New Hampshire in

Emmons v. Utilities Power Company
82 N. H. 181
141 Atl. 65, 68, 69

"A new situation has been created by the taking. **The condemnor has eliminated all uncertainty of effecting the combination of the properties.** But the issue is still, what was the market value of the land in its undeveloped and separate state? The test is always the market value of the land when taken, and 'not the value which it might have under circumstances different from those then existing.' "

* * * * *

"The true rule seems to be that the enhanced market value, if any, of the plaintiff's land, due to its adaptability for valuable uses in conjunction with other properties, may be shown if the practicability of the combination of all the necessary properties upon which such availability depends was at the time of the condemnation so great as to have probably affected the public mind, and therefore to have enhanced the price which a purchaser might be expected to give."

The law, the logic, and the economics of the situation require that all factors, favorable as well as unfavorable, be considered insofar as they appear to have affected market values. Judge Booth stated the question and its answer briefly and clearly:

> "It seems to me that the question is one of fact whether the adaptability for reservoir or flowage purposes coupled with the long continued actual use for such purposes entered into the value of such lands or not. . . . The question whether the adaptability, coupled with the actual use, did in fact enter into the value of the lands was, in my opinion, for the jury, and the question should have been submitted under proper instructions." (R. 436-437).

VIII. IN AFFIRMING THE JUDGMENTS OF THE DISTRICT COURT, THE MAJORITY OF THE CIRCUIT COURT OF APPEALS ERRED, BECAUSE SAID JUDGMENTS DENIED PETITIONERS THE RIGHT TO PROVE AND TO HAVE THE JURY AWARD THE VALUE OF THE FLOWAGE EASEMENT ON THEIR LAND AS A SEPARATE UNIT OF PROPERTY.

Petitioners urge that the judgment of the Circuit Court of Appeals denying their right to prove and to recover the fair market value of the flowage easement, as a distinct unit of property, was error. In view of the fact that the Treaty of 1925, and the en-

abling legislation, provided for the acquisition of **a flowage easement,** just compensation is the fair market value of the flowage easement acquired.

It is recognized that the usual and orthodox method of assessing just compensation is to determine the value of the property immediately before and immediately after the taking, and compute the difference.

In the instant cases, however, the government is acquiring a flowage easement. Why not determine just compensation which must be paid therefor by ascertaining directly, what is the value of the property which is taken?

The orthodox method of assessing the difference in the value of the land before and after the taking, came into practice in the condemnation of rights-of-way for roads, and later for railroads, under circumstances which did not require the taking of the entire property affected. A right-of-way for a railroad or a road could usually run over any one of a number of different tracts of land, and seldom required the taking of the entire tract. Naturally the decrease in the value of the tract was the logical measure of just compensation in such a case.

But a different rule obtains where the entire unit of property is taken.

A owns a city lot or a ten acre tract, and the en-

tire tract is taken. What then is the measure of compensation?

A owns mineral rights on B's land, or owns an easement for travel over C's land, or owns an equity in a quantity of coal in his own coal yard. If the government takes A's mineral rights or his easement for travel, no one will question that just compensation would be the value of the property taken.

Likewise when the government during the war appropriated private property for public use, the value of the property on the market was the measure of just compensation, regardless of the intrinsic value of the property. When no fair or free market existed for the property which had been taken, the opinion of qualified experts as to the fair value of the property was accepted as the basis for computing just compensation.

C. G. Blake Co. v. U. S.
275 Fed. 861
aff'd 279 Fed. 71

National City Bank v. U. S.
275 Fed. 855

U. S. v. New River Collieries
262 U. S. 341

Why should we not assess just compensation for a flowage easement, in exactly the same way as compensation is determined wherever the entire unit of that particular property is taken?

Petitioners urge that the before-and-after measure of compensation does not properly or logically apply where the property taken is a separate unit or species of property, and is capable of being acquired and transferred independently of the land on which it may be located.

Cases may arise where both measures should be used, as where a part of a city lot is taken for an elevated railway, the remaining portion of the lot may be damaged by noise or dust. **In the instant case, however, appellants have expressly waived all claims for damage to their land not covered by the easement. The entire flowage right up to elevation 1064 sea level datum is taken. The question is, what is just compensation for it?**

Suppose Petitioner Olson had a 99 year lease on Petitioner Karlson's land, and that he had a building, or a lease-hold, admitted to be worth $10,000. If the Government acquired or destroyed Mr. Olson's building would any one attempt to determine the compensation due him for the loss of his building by trying to compute the market value of Mr. Karlson's fee before and after the taking?

Or suppose the Canadian power interests, thirty years ago, had organized an American subsidiary and had lawfully acquired and paid for a flowage easement on all American lands in the Lake of the Woods storage reservoir, and had continued to use said easement for storage and power purposes, just as they have done for thirty years; then suppose the

Government sought to acquire said flowage easement by condemnation, would anyone suggest that the compensation due the Canadian interests for their flowage easement held by their American subsidiary, would be limited to the before-and-after value of the bare naked fee title? Surely no one would deny that the owners of said flowage easement should be paid the fair value of their easement for the uses and purposes to which it was then, and for the past thirty years had been, devoted, and for which it was most adaptable and valuable.

Then suppose the Canadian power interests had acquired all flowage easements contained in the Lake of the Woods storage reservoir except the flowage right and easement belonging to Petitioner Olson. Would anyone urge that one measure of just compensation should be paid to the Canadian interests, while another measure should be paid to Petitioner Olson?

A similar situation was discussed and commented upon in **C. G. Blake Co. v. U. S., supra**, where the question was the compensation which should be paid for a quantity of coal that had been requisitioned by the Government. The Court said (p. 867):

> "Suppose this coal had been requisitioned not from the producers . . . but from those who had produced the same upon the open market. . . . would it be said that the measure of just compensation was the cost of production

plus a reasonable profit? Or, on the other hand, cost to the dealer from whom it was taken plus a reasonable profit? Assuming part were requisitioned from the producer and part from the retail dealer, would they be allowed different rates of compensation? Is the compensation to be determined by who receives it? Just compensation is for the property, not to the owner. Mr. Justice Brewer in **Monongahela Navigation Co. v. U. S., 148 U. S. 312."**

Yet, the court, in the instant case, excluded all evidence of the value of the flowage easement which the Government is seeking to acquire, and instructed the jury to estimate compensation on the adaptability and use of the lands for agriculture. No land used or adaptable for agriculture is taken. Then why talk about value for agriculture? A flowage easement is taken. Why not determine its value, and pay it?

Article 8 of the Treaty of 1925 between the United States and Canada provides that:

> **"A flowage easement** shall be permitted up to elevation 1064 sea level datum upon all lands bordering on Lake of the Woods in the United States, and the Untied States assumes all liability to the owners of such lands **for the cost of such easement."**

It will be observed therefore, that it is the **flowage easement** which is being acquired and paid for.

The Act of Congress which carried said treaty

into effect, authorizes and directs the Secretary of War:

> "to acquire . . . by purchase or by condemnation . . . **the flowage easements** up to elevation 1064 sea level datum upon all lands in such state (Minnesota) bordering on the Lake of the Woods . . ."

Likewise the Government's petition in these proceedings

> "prays for a judgment in these proceedings that it acquire the **perpetual easement**, right and privilege as against all the respondents . . . **to overflow** all that part of the lands hereinbefore described;" etc. (R. 5-6).

It is plain that we are concerned with the value of the **flowage easement.**

It is well settled that easements of all kinds are dealt with in the law as property, separate and distinct, just the same as any other item of property, and that when they are acquired by condemnation just compensation must be paid therefor.

20 Corpus Juris, Sec. 83, p. 593

20 Corpus Juris, Sec. 131, p. 655

2 Dunnell's Minn. Digest § 3037

Adams v. C. B. & N. Ry. Co.
39 Minn. 286, 290
39 N. W. 629

International Paper Co. v. U. S.
282 U. S. 399

Carondelet Canal Co. v. Louisiana
233 U. S. 362, 388

U. S. v. Cress
243 U. S. 316

It is well settled that flowage rights and storage reservoirs are listed and valued as property in determining the rates to be charged by public utility companies, and also for taxation purposes.

San Joaquin & C. Co. v. County of Stanislaus
233 U. S. 454

McCardle v. Indianapolis Water Co.
272 U. S. 400

Township of Beaverton v. Lord
235 Mich. 261
209 N. W. 122

It will be agreed that it is not only good law but that it is good business and sound economics to treat storage reservoirs and flowage easements as separate units of property. Taxing authorities are under the necessity of finding new sources of income, and it is now generally recognized that storage reservoirs and flowage easements may be taxed, and that likewise these same items of property may be, and are, carried on the books of public utility companies at high values, and are appraised in determining the rates which shall be charged for service.

In the instant case Petitioners offered to prove as a fact by competent witnesses, that flowage easements and flowage rights are sold and dealt in generally as separate units and items of property (R. 41-43, 80, 87) and that in the State of Minnesota conveyances of flowage easements are recorded under the recording act, and that they are assessed and taxed as property, both by the state and municipal taxing authorities (R. 41-43).

The record clearly establishes the following facts which are not disputed:

1. That the flowage easement being acquired is absolutely necessary to the formation and use of the Lake of the Woods storage reservoir (R. 36).

2. That said reservoir was formed for power purposes by the construction of the Norman Dam by the Keewatin Power Company more than thirty years ago, and that it has been in use for the development of hydro-electric power ever since (R. 22-23, 61-62, 71, 73-74).

3. That for all practical purposes the easement now acquired by the government will be used for identically the same purposes, and Petitioners' lands will be subjected to the same use and servitude as have obtained during the past thirty years, and that it is the property's most adaptable and valuable use (R. 22-23).

4. That the flowage now being acquired by the Government has been imposed on Petitioners' land, and on the shore land of the Lake of the Woods ever since 1898 substantially as it will be in the future under the treaty regulation (R. 22-23).

5. That this condemnation proceeding by the Government is not a part of a development that is to come up in the future, but that it is a proceeding to condemn a flowage imposed upon the land in question ever since 1898 (R. 22-23).

6. That the flowage easement being acquired covers all lands and all flowage rights included on the American portion of the Lake of the Woods storage reservoir, and therefore is a complete taking of Petitioners' entire flowage property up to elevation 1064, and no claim is made for damage to remaining property.

It would appear from the foregoing that the flowage easement which is being condemned is a complete, existing unit of property; that it has been in existence for more than thirty years; that it is now being condemned for identically the same use as it has served for a third of a century; that it will continue perpetually to be so used, and that the entire unit of property is being taken.

We believe that the law and logic of the situation dictate that under these facts just compensation is the fair value of the property taken, and not the con-

sequential damage sustained by the owners of the naked fee, and that accordingly Petitioners were entitled to have the court give their first request for instructions to the jury, as set forth in their Assignment of Error No. 129 (R. 405).

Whatever confusion there may appear to be in the language by some courts in dealing with the subject of just compensation in cases of this kind, is due, we believe, to failure to distinguish between cases where the entire unit of property is taken, and other cases where only a part of the property is taken. In the former class of cases it is urged that the value of the property taken is the proper measure of compensation.

It is a distinction between **compensation for property taken,** when it is all taken, and **damages to the remaining estate** when the property is not all taken. In the instant cases all of the flowage rights permitted by the Treaty, and all of the flowage property which can possibly belong to Petitioners according to the Treaties of 1909 and 1925, is being taken, and **Petitioners have expressly waived all claims for damage to their remaining property.**

It is stated in the majority opinion that the "unit rule" should not be applied to these cases because it does not appear that the entire right of flowage is taken. The fact is that the Treaty of 1909 provides that there shall be no interference with boundary waters except by authority of the International Joint Commission. That Commission, after full investiga-

tion, has recommended a flowage easement to elevation 1064; and that level has been fixed by the Treaty of 1925, and by Act of Congress. There can be no change in that level, or in the flowage easement without the approval of the International Joint Commission and the concurrence of Canada and the United States in a modification of the Treaty. No other flowage easement, therefore, can be possible, without the approval of the International Joint Commission, and concurrence of both Governments. We believe, therefore, that for all practical purposes it may be said that all of Petitioners' flowage rights and property are taken in these proceedings.

The majority opinion holds, on the authority of **Boston Chamber of Commerce v. Boston, 217 U. S. 189,** that Petitioners may not separate the flowage easement from the fee for the purpose of determining just compensation.

What was held in the **Boston Chamber of Commerce case** was that the Chamber of Commerce could not unite its interests with the interest of a mortgagee, and the interest of Central Wharf etc., Corporation, which held a perpetual easement for travel over the plot of ground owned by The Chamber of commerce, and, in that way, eliminate the easement from consideration and present an unincumbered title on which to claim compensation.

So far as the Chamber of Commerce was concerned there was a perpetual easement for travel outstanding against its plot of ground. That outstand-

ing easement was not extinguished by the arrangement entered into between the Chamber of Commerce and the owner of the easement. Obviously, a city lot, encumbered with a perpetual easement for travel, is not entitled to the same compensation for its taking as it would be if it were unencumbered and available for business purposes. The fact that the owner of the fee and the owner of the easement combined their interests could make no difference. The property taken was still a plot of ground encumbered with a perpetual easement for travel. **That easement for travel was not taken in the condemnation proceeding, for the plot of ground in question would still be available for travel after acquisition by the city.**

With Petitioners it is different. They own the entire unencumbered fee. If they shall be paid for the flowage easement, they will be paid only for what is theirs, and for what is taken from them. If payment were made to the Boston Chamber of Commerce for an unencumbered lot, the City of Boston would be paying for something which did not exist, which it did not take, and which the Chamber of Commerce did not own; but if payment were made to Petitioners, measured by the value of the flowage easement taken, the Government would be paying for exactly what it has taken, and Petitioners would be paid only for what was their own unencumbered property, which has been taken from them.

Because of the dissimilarity in the facts, we believe that the **Boston Chamber of Commerce case** is not a controlling authority against allowing Peti-

tioners to prove the fair market value of the flowage easement, and to have their just compensation measured thereby.

IX. IN AFFIRMING THE JUDGMENTS OF THE DISTRICT COURT, THE CIRCUIT COURT OF APPEALS ERRED BECAUSE SAID JUDGMENTS ARE CONTRARY TO THE SPIRIT OF THE TREATY OF 1925, AND THE ACT OF CONGRESS FOR CARRYING IT INTO EFFECT.

To avoid extending Petitioners' brief unduly, we submit this point without argument on the discussion of it by Judge Booth in his dissenting opinion (R. ft. 437, 438).

CONCLUSION

From the foregoing examination of the facts and the law it appears fair to conclude:

1. It was error to exclude evidence of the actual use served by Petitioners' lands, at and prior to the time of taking, because such use was the most valuable for which said lands are adapted, and formed the basis of their market value; also because the Treaty of 1925 and Acts of Congress clearly contemplate that such use and adaptability should be considered in estimating just compensation.

2. It was error to exclude evidence of the special adaptability of Petitioners' lands for reservoir purposes, because their adaptability and demand for

their continued use, together with the practicability of uniting the properties had all been assured by thirty years of actual use for storage, which gave the lands an increased market value entirely independent of any plan or act of the taker.

3. It was error to instruct the jury to disregard all evidence of the special adaptability and actual use of Petitioners' lands in determining their market value, because their market value was based entirely on their adaptability and use for reservoir purposes; and was admittedly higher than that of lands as well adapted for agriculture, but which were not adapted for storage.

4. It was error to instruct the jury to determine the market value of Petitioners' lands solely on their adaptability and use for agriculture, because they have never been used for agriculture, and they have no adaptability for that purpose. The jury was instructed to disregard the market value which existed in fact, and to assume a market value based upon a hypothesis which never was, and never will be, a fact.

5. It was error to hold that Petitioners had no rights of redress for the use which had been made of their shore lands, because the Treaty of 1909 gave them such rights, and because they possessed such rights under general law.

6. It was error to exclude evidence of the market value of the flowage easement, as a separate unit of property.

7. It was error to affirm the judgments of the District Court because said judgments took Petitioners' property without just compensation in violation of the Fifth Amendment to the Constitution of the United States, and of Article I, Section 13 of the Constitution of the State of Minnesota.

For these reasons the judgments of the Circuit Court of Appeals for the Eighth Circuit should be reversed, and new trials should be granted.

Respectfully submitted,
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The State of Minnesota having lands affected by the foregoing entitled proceedings, and being interested in the determination of the questions involved herein, has appeared by permission of the court at the trial of the cases in which the foregoing entitled appeals were taken, and joins with Petitioners in the foregoing brief

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APPENDIX A

PERTINENT PARTS OF THE TREATY OF 1909 BETWEEN THE UNITED STATES AND GREAT BRITAIN WITH RESPECT TO THE DOMINION OF CANADA. 36 STAT. PART II, PAGE 2448.

"The United States of America and His Majesty the King of the United Kingdom of Great Britain . . . being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise, have resolved to conclude a treaty in furtherance of these ends . . . ."

ARTICLE II.

"Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary,

shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing, or to cases expressly covered by special agreement between the parties hereto. * * * *"

ARTICLE III.

"It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission." * * *

ARTICLE IV.

"The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the

effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission." * * *

ARTICLE VIII.

"This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this treaty the approval of this Commission is required. * * *

"In cases involving the elevation of the natural level of the waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters, or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby. * * *"

APPENDIX B

PERTINENT PARTS OF THE TREATY OF 1925 BETWEEN THE UNITED STATES AND GREAT BRITAIN WITH RESPECT TO THE DOMINION OF CANADA, 44 STAT. PART III, PAGE 2108.

"The United States of America and his Majesty

the King of the United Kingdom of Great Britain
* * *

"Desiring to regulate the level of Lake of the Woods in order to secure to the inhabitants of the United States and Canada the most advantageous use of the waters thereof and of the waters flowing into and from the Lake on each side of the boundary between the two countries, and

"Accepting as a basis of agreement the recommendations made by the International Joint Commission in its final report of May 18th, 1917, on the Reference concerning Lake of the Woods submitted to it by the Governments of the United States of America and Canada,

"Have resolved to conclude a Convention for that purpose. * * *"

ARTICLE VIII.

"A flowage easement shall be permitted up to elevation 1064 sea level datum upon all lands bordering on Lake of the Woods in the United States, and the United States assumes all liability to the owners of such lands for the costs of such easement. * * *"

ARTICLE IX.

"The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.

"Each shall likewise assume responsibility for any damage or injury which may hereafter result to it or to its inhabitants from the regulation of the level of Lake of the Woods in the manner provided for in the present Convention."

ARTICLE X.

"The Governments of the United States and Canada shall each be released from responsibility for any claims or expenses arising in the territory of the other in connection with the matters provided for in Articles VII, VIII, and IX.

"In consideration, however, of the undertakings of the United States as set forth in Article VIII, the Government of Canada shall pay to the Government of the United States the sum of two hundred and seventy-five thousand dollars ($275,000) in currency of the United States. Should this sum prove insufficient to cover the cost of such undertakings one-half of the excess of such cost over the said sum shall, if the expenditure be incurred within five years of the coming into force of the present Convention, be paid by the Government of Canada."

PERTINENT PARTS OF PROTOCOL ACCOMPANYING CONVENTION TO REGULATE THE LEVEL OF THE LAKE OF THE WOODS.

"2. Should it become necessary to set up a special tribunal to determine the cost of the acquisition of the flowage easement in the United States provided for in Article VIII of the Convention, the Government of Canada shall be afforded an opportunity

to be represented thereon. Should the cost be determined by means of the usual judicial procedure in the United States, the Government of Canada shall be given the privilege of representation by counsel in connection therewith."

APPENDIX C

PERTINENT PARTS OF THE ACT OF MAY 22, 1926, 44 STAT. PART II, PAGE 617, AS AMENDED BY ACT OF APRIL 18, 1928, 45 STAT. PART I, PAGE 431.

"That the Secretary of War be, and he is hereby, authorized and directed to acquire, as soon as practicable after the enactment of this act, by purchase or by condemnation, in accordance with the provisions of the Act entitled 'An Act to authorize condemnation of land for sites for public buildings, and for other purposes,' approved August 1, 1888, and in accordance with the constitutional provisions of the State of Minnesota which provide that private property shall not be taken, destroyed, or damaged for public use without just compensation therefor first paid or secured, the flowage easements up to elevation one thousand sixty-four sea-level datum upon all lands in such state bordering on the Lake of the Woods, Warroad River, and Rainy River, and such lands or interests therein as are necessary to provide for the protective works and measures in such state along the shores of the Lake of the Woods and the banks of the Warroad River and the Rainy River as specified in Article 8 of the Convention

signed at Washington on the 24th day of February, 1925, between the Governments of the United States and Great Britain, providing for the regulation of the level of the Lake of the Woods.

"In proceeding by condemnation for acquiring such flowage easements on any tract of land any benefit to the remainder of the tract or the property thereon derived from such easement shall be considered and damages shall be awarded accordingly.

"Sec. 2. * * * All moneys which may be paid by the Government of Canada to the Government of the United States under Article 10 of the Convention are hereby appropriated and made available for expenditure by the Secretary of War for the construction of such works, and the carrying out of such measures, and for the acquisition of easements, lands, and interests therein, as provided in Section 1 of this Act. * * *

"Sec. 3. The Secretary of War is hereby authorized and directed to cause to be investigated, as soon as practicable, all claims for damages caused, prior to the acquisition of flowage easements under this Act, to the inhabitants of the United States by fluctuation of the water levels of the Lake of the Woods due to artificial obstructions in the outlets of said lake, and after due notice and opportunity for hearing, shall ascertain and determine the loss or injury, if any, that may have been sustained by the respective claimants and to report to Congress for its consideration the amount or amounts he may find

to be equitably due such claimants, together with a statement in each case of the substantial facts upon which the conclusion is based. * * *"

APPENDIX D

ARTICLE I, SECTION 13, CONSTITUTION OF MINNESOTA

"Section 13. **Private Property for Public Use—** Private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured."

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No. 580, 581, 582

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CHARLES ELMORE CROPLEY

CLERK

IN THE

Supreme Court of the United States

October Term, 1933

ELIAS A. OLSON, *Petitioner*,

vs.

UNITED STATES OF AMERICA

RANDOR G. KARLSON, *Petitioner*,

vs.

UNITED STATES OF AMERICA

HARRY BREWSTER, *Petitioner*,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
I. The nature and purpose of the excluded evidence	2
II. Necessity for governmental consent and cooperation admitted, but such necessity does not eliminate special adaptability and actual use from consideration	3
III. Respondents' claim that the international character and control of the lake eliminates special adaptability and use from consideration, as a matter of law, is unsound in several respects	6
IV. The higher market values which prevailed for many years before the taking may not be eliminated from consideration, on account of being speculative, or in anticipation of the present taking	9
1. Higher values prevailed before report of International Joint Commission was filed	9
2. The perpetuation and legalization of the use for reservoir purposes was an established certainty	9
3. Market value must be determined as of the date of filing the award	10
V. The fact that the reservoir serves other uses than power development does not require the exclusion of Petitioners' evidence	11
VI. Construction of Treaties and Petitioners' rights thereunder and under General Law	12
Rights under Treaty of 1909	14
Rights under General Law	15
The materiality of past use and flooding of Petitioners' lands in determining market value	18
Respondent derived no rights by adverse use	19
VII. The Indian appropriation acts	20
Conclusion	20

CITATIONS

CASES: Page

Monongahela Navigation Co. v. U. S., 148 U. S. 312 7, 11, 18
Northern Pacific R. Co. v. North Am. Tel. Co., 230 Fed. 347 (C. C. A. 8th) 19
Pacific Gas and Electric Co. v. U. S., 45 F. (2d) 708 18
U. S. v. Bernard, 202 Fed. 728 18
U. S. v. Chandler-Dunbar Co., 229 U. S. 53 ..... 7, 8, 11
U. S. v. Wheeler Township, 66 F. (2d) 977 20
Utah Power and Light Co. v. U. S., 243 U. S. 389 ... 18
Weaver v. Miss. and Rum River Boom Co., 28 Minn. 534, 11 N. W. 113, 28 Minn. 542, 11 N. W. 114 ... 18
Wolfe v. Meyer Bros, 171 Minn. 98, 213 N. W. 549 .. 18
Yates v. The King, 20 Ex. C. R. 175 16

TREATIES AND STATUTES:

The Treaty of 1909 between U. S. and Canada 12, 13, 14, 15, 17
The Treaty of 1925 between U. S. and Canada 15, 17

MISCELLANEOUS:

Final Report of International Joint Commission ... 13
Sutherland on Damages, Vol. 4, p. 3746, sec. 1014 .. 18

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF.

Petitioners respectfully request the Court's permission to file the following Reply Brief.

Respondent's Briefs follow very closely the reasoning and authorities employed and relied on in the majority decision of the Circuit Court of Appeals. Accordingly, if Petitioners' Brief is reasonably accu-

rate and sound in its statement of the facts and the law and in its analysis of the majority decision, it will serve as a reply to most of Respondent's arguments.

Some further discussion of a few fundamental propositions may prove helpful:

I. The nature of the evidence excluded and the purpose for which it was offered are of controlling importance, and appear to be misunderstood by both Respondents.

The Brief for the United States (ft. p. 31) states: "The only question in the courts below was the measure and amount of compensation payable to the petitioners upon the taking." And again on page 32, "—And neither thought the value of the reservoir should be divided up among them."

Respondent's Briefs contain other statements which indicate that it is Respondent's understanding that Petitioners claimed something in addition to the fair market value of their land. Such is not the fact.

Petitioners make no claim to any part of the value of the completed reservoir. They make no claim for anything above the fair market value of their lands, determined in the way market value of land is always determined, by a consideration of the use and adaptability of the land, and of all factors, favorable and unfavorable, which are shown to have affected market values.

Respondent's are in error when they state that "the only question in the courts below was the measure and amount of compensation." The question was, what evidence should be considered by the jury in determining the "amount" of compensation. (See the court's instructions to the jury R. 130.) Much of Respondent's argument falls short of the point, it is respect-

fully suggested, because they mistook Petitioners' claim, and the purpose for which the excluded evidence was offered. This is notably true of Respondent's discussion of the effect of the past flooding of petitioners' lands, and petitioners' right to collect compensation therefor.

The dissenting opinion states:

> "It should be kept clearly in mind that the testimony sought to be introduced,—but excluded, was not offered for the purpose of obtaining past damages for past trespass, but solely for the purpose of establishing an existing and established element of value in the land, to be considered by the jury in fixing the compensation for the acquirement of a flowage easement for the future; and, further, that the testimony sought to be introduced, but excluded, was not offered for the purpose of establishing a value of the flowage use which had come into existence by reason of the commencement of the condemnation proceedings. The testimony was proffered for the purpose of establishing the value of a flowage use which had existed for many years and which value was claimed to be an important element in the total value of the particular land taken."

II. Many pages of Respondents Briefs are devoted to proving that it would not be possible for any persons or corporation to create and operate the Lake of The Woods Storage Reservoir without the consent and cooperation of the several governments involved.

The reasons advanced are numerous, but Petitioners have never disputed them nor the ultimate conclusion that governmental sanction and cooperation must be had.

However, Respondents have stated no reason and cited no authority which would eliminate special adapt-

ability and actual use from consideration merely because the permission and cooperation of the governments are necessary. We venture the assertion that no such reason or authority exists.

In such a case two considerations are controlling: (a) Are the permission and cooperation of the government or governments so likely to be forthcoming that business men would be reasonably justified in relying thereon, and that market values would be affected thereby? (b) Does the property in question, because of its character or location, possess inherent adaptability for a special use, or is its adaptability created by the consent and cooperation of the governments?

If governmental consent and cooperation are reasonably probable, and if the property possesses inherent adaptability independently of governmental action, then the fact that governmental consent and cooperation must be had in order to put the special adaptability to work will not exclude the special adaptability and actual use from consideration in determining market value.

The fact that action must be had by a government or by a number of governments is no different than necessary action by one or more persons or corporations. There is nothing about governmental permission and cooperation that gives a different rule of law than applies to permission and cooperation by private parties, except as to the probability that the necessary action will be forthcoming. It is the *probability* that the necessary cooperation to put the adaptability to work, will be given that is controlling, rather than who is to furnish the cooperation.

Suppose A and B own the dam site and all but 10 acres of the riparian lands which C owns. Could A and B exclude the special adaptability of C's land

from consideration in determining its market value, because it would be impossible to use C's special adaptability without the consent and cooperation of A and B? If A and B are governments the rule is the same. (Petitioners' Brief, pp. 92-100)

It will not be disputed that petitioners' lands possess special adaptability which is inherent and not created by governmental action. In fact it is the inherent adaptability and value of these shorelands which caused all of the governmental activity. Nor can it be denied, on the record before the Court, that this special adaptability and actual use actually affected market values.

It remains then only to determine whether the consent and cooperation of the governments in question were so likely to be granted that business men would be reasonably justified in acting thereon.

The facts are undisputed on the record that all parties, including the governments, Indian tribes, and private owners have consented and cooperated for 30 years. Canada and the United States through their International Joint Commission gave every indication of desiring to legalize the use which had been made and the cooperation which had existed for 30 years. Respondents' Briefs clearly show that the interests of both countries, including navigation, required such governmental consent and cooperation. There is every reason why such consent and cooperation should be granted, and no reason has been suggested by any one why it should not be granted. Probably the surest proof that businessmen were justified in relying on such consent and cooperation is the fact that Canadian business men invested many millions in reliance thereon.

Surely no one will seriously claim that there has been the slightest doubt at any time during the past 25 years that the governments, including the Indian tribes, would give such consent and cooperation as would permit the special adaptability of petitioners' and other's lands to be lawfully used for the creation of wealth and the service of mankind.

Such being the undisputed facts, the special adaptability and use of the lands for such purpose must be considered in determining their market value, and the fact that governmental cooperation and consent are necessary make not the slightest difference, on the record before the Court.

III. Respondents urge that because the Lake is international in character and because, in the past, its levels have been regulated by Canada and, in the future, will be regulated by Canada and the United States, it would be impossible for any private person or corporation to control the storage reservoir, and consequently the market value of the shorelands could not possibly be affected by their special adaptability or actual use for storage purposes.

Respondents' contention is unsound in several respects.

1. Government supervision and control over the use of property possessing special adaptability does not eliminate such special adaptability from consideration in determining the market value of the property.

2. Complications which might arise due to the international character of the lake might detract from the value of the special adaptability of the lands, but it could not, as a matter of law, completely eliminate such special adaptability from consideration. As stated in the dissenting opinion, all of the facts and

circumstances should be submitted to the jury under proper instructions.

3. The fact that, at the time of taking, there was no taker except the government, and that at no time could the shorelands have been used for storage purposes without government consent and strict supervision and control, does not, as a matter of law, eliminate special adaptability and actual use from consideration in determining market value.

The three foregoing propositions are elemental. No authority to the contrary is cited by Respondents. Two decisions of this Court illustrate the general rule:

Monongahela Navigation Co. v. U. S. 148 U. S. 312.
U. S. v. Chandler-Dunbar Co., 229 U. S. 53.

In the Monongahela case the United States was acquiring a lock and dam built by the company in the navigable waters of the Monongahela River. The principal question was whether the government must pay for the use value of the lock and dam represented by the value of its franchise to take tolls from those who used them. The Court held that the value to the owner of the use made of its property must be paid.

The Monongahela River being navigable and an interstate boundary, the construction and use of the dam and lock were obviously subject to regulation and control by the two states and by the Federal Government. Likewise, under the circumstances, the Federal Government was the only possible taker. These facts however did not exclude from consideration, in fixing just compensation, the use which the property served at and prior to the time of taking, and the value of such use to the owner!

Likewise, in the Chandler-Dunbar case, the strip of land taken lay between the ship canal owned by the United States, and the St. Marys River, an international boundary navigable stream. The strip of land was especially adapted for canal purposes. Obviously such canal, if and when built, would be subject to the minutest regulation and control by both governments, just as are the waters of the Lake of the Woods. Probably no one except the United States or Canada would ever consider constructing a canal and locks on that property in view of all the existing circumstances. The owner of the land had derived no income from it on account of its special adaptability for lock and canal purposes. At the time of taking, the United States was the only possible taker, just as claimed by Respondents in the instant case.

Yet this Court required the United States to pay the fair market value of the strip of land, in view of and giving consideration to its special adaptability for lock and canal purposes. (See p. 82 Appellants' Brief.)

4. The foregoing considerations demonstrate that Respondents' contentions are unsound as a matter of law, they are also unsound and erroneous on the facts.

It has already been demonstrated that for more than twelve years before these proceedings were begun Petitioners could have sold their lands for higher prices because of their special adaptability and actual use for reservoir purposes; that similar lands were actually bought and sold for higher prices on that account, that reservations of these flowage rights were made in instruments of conveyance, and that these increased market values were a benefit and of value to Petitioners. (See Appellants' Brief, pp. 28-42.)

On these established facts, and in view of the decisions of this Court, Respondents may not, without dis-

regarding the facts and the law, contend that it was impossible for the special adaptability and actual use of Petitioners' lands to affect market values. The values were in fact affected.

IV. Respondents next insist that the higher market values which were paid for these shorelands, on account of their special adaptability and use, should be entirely disregarded, for the alleged reason that such values grew out of the human impulse to speculate, and in anticipation that some day the Government might acquire the lands.

This contention likewise is unavailing to Respondents:

1. Higher market values were paid for these lands before the report of the International Joint Commission was published. No one, at that time knew what the report would be, nor that it would be the government that would acquire the lands. (See Petitioners' Brief, p. 32.)

2. The value of these shorelands for reservoir purposes, and the great value of the reservoir, were such that it was a certainty that the reservoir would be perpetuated. It was a certainty that some entity would acquire the shorelands, the reservoir could not exist, lawfully, without them. The reservoir which had been used for 30 years, and on the anticipation of the continued use of which millions had been invested by Canadian enterprise, and the value of which according to Judge Rockwood, Counsel for Minnesota and Ontario Power Company, represented, to the power companies alone, interest at 5 per cent on $23,000,000.00, would never be abandoned. In addition to these great values Respondents have called attention to the contribution which the reservoir made to navigation, and

the interest displayed by both governments in the continued existence and control of the reservoir. Because of the certainty that the reservoir would be continued, both governments withdrew their public lands from entry, though the United States did not withdraw its lands until it had patented several thousand acres to settlers in addition to the acreage reported by the International Joint Commission. Probably few if any investments are further removed from speculation than was the certainty that Petitioners' lands possessed inherent adaptability for a special use, that such use was very valuable, and that both the use and the value was certain to continue. Surely, on these facts, the increased market value of these lands for more than twelve years before their taking in these proceedings, should not be disregarded because of speculation and uncertainty. An existing continuing market value is not disregarded because based in part on anticipated future development, apparently certain.

3. Market Value is to be determined as of the date of filing the award of the Commissioners in the condemnation proceedings. In this instance it would be in 1929. It follows that market values which prevailed from 1916 to 1929, and the facts and circumstances upon which such values are based must be taken into consideration in determining the market value in 1929. It will not do to say, that such market values are in anticipation of the taking, and so must be disregarded, for every increase in value resulting from special adaptability must occur because it is anticipated that some day the property will be taken and used for the purpose for which it is especially adapted. If it were not so anticipated, market value could not be affected by the special adaptability. If increased market value based upon special adaptability which it is reasonable

to anticipate will some day be taken and used must be excluded, as Respondents claim, and if special adaptability, which has not affected the market value, must be disregarded, because it is speculative and uncertain, it would follow that special adaptability could never be considered in determining market value. It is probably for this reason that the date of filing the award has been adopted as the dividing line, and any fact or circumstance affecting market value prior to that date, and which is not contributed by the taker must be considered.

> "Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, *it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose.*" U. S. v. Chandler-Dunbar Co., *supra.*

V. Respondents stress the fact that the reservoir is not used exclusively for the development of power, and that navigation and other interests benefited therefrom.

That fact is not disputed. But it does not detract from Petitioners' rights nor justify the majority decision. It is special adaptability and actual use for *Reservoir purposes* which Petitioners' lands possess, and it was such special adaptability and use which Petitioners sought to prove, but were denied. It is not material for what purpose the reservoir is used. If it were used exclusively for navigation purposes, and if the United States alone were interested, the majority decision of the Circuit Court of Appeals would be equally erroneous.

> Monongahela Navigation Co. v. U. S., *supra.*
> U. S. v. Chandler-Dunbar Co., *supra.*

VI. As to Petitioners' Rights under the Treaties of 1909, and 1925, and the effect of the construction placed upon the treaty of 1909 by the majority decision of the Circuit Court of Appeals.

If we correctly understand Respondents' position relative to Petitioners' rights under the Treaty of 1909, it is:

1. That Petitioners had no rights whatever to recover for the past flooding and use of their lands, either under the Treaty or under general law;

2. That even if they had any rights, such rights are not available to Petitioners because being based on foreign law, such law must be pleaded and proved, and that was not done.

3. In any event, neither the past use of Petitioners' lands nor their right to recover for such use is material in proving the fair market value of Petitioners' lands.

4. That if Petitioners had any right to recover for the flooding and use of their land such right has been lost by more than twenty years adverse user.

As a starting point in considering Respondents' position, it will be helpful to begin with Section IV of the Treaty of 1909. This section provides that:

> "The High Contracting Parties agree that, except in cases provided for by Special Agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstruction in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission."

This section of the treaty clearly amounts to an Agreement by the Canadian Government that it would not permit the *Maintenance* of the Norman Dam in such a way as "to raise the natural level of waters on the other side of the boundary."

Respondents suggest the possibility of a "special agreement" in the fact that the International Joint Commission reports that in 1905, the Government of the United States "suggested" to the Dominion Government that the Norman Dam be so operated as to prevent the lake level from falling below elevation 1,060.8.

Obviously such a "suggestion", not complied with could not amount to a "Special Agreement." The Commission expressly reports that "the Canadian Government concluded that the request of the United States Government could not be granted" without injury to important industries in Canada. (Final Report D. J. C., ft. p. 18.)

That there was no "special agreement" permitting the maintenance of the Norman Dam is further shown by the statement of the International Joint Commission that during the period following the construction of the Norman Dam and the consequent use of the boundary waters "such use gave rise to serious differences between the people of the two countries, and was also the subject of diplomatic correspondence between the Governments." (Final Report I. J. C., mid. p. 85.)

Likewise the reference of the dispute to the International Joint Commission does not indicate a prior "Special Agreement" permitting the maintenance of the dam.

The next question is did the violation of Article IV of the treaty and the consequent use of Petitioners'

lands for reservoir purposes give Petitioners any right to recover for the use thus made of their lands.

The Proclamation accompanying the treaty states that the high Contracting Parties have entered into the treaty, "being equally desirous to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other, along their common frontier, and to make provision for the adjustment and settlement of all such questions as may hereafter arise."

It will be remembered that the use of Petitioners' lands, and others, was then a pending question.

Rights Under the Treaty of 1909

It is Petitioners' belief and claim that the violation of Article IV of the Treaty gave them a right to recover for the unlawful use of their land, either under Article II of the treaty or under general law. (See Petitioners' Brief, pp. 43-52, inc.)

Respondents' suggested construction of the right of action granted by Article II limiting it to rivers which flow across the boundary is unnecessarily restricted, and is contrary to the express purpose of the treaty which was to "settle all questions which are now pending." No reason has been suggested for giving a right of recovery for obstruction to such rivers, and giving no such right for interference with boundary waters.

Furthermore, if the limited construction Respondents suggest be placed upon the treaty, private parties are left with no direct means of redress. There is no provision whereby a private party may submit his

grievance to the Commission. Only the respective governments may refer questions to the Commission. Such a construction places an unnecessary burden upon the diplomatic service and upon the Commission. And especially does it deny the residents of each country the right under the treaty to have their grievances redressed in a duly constituted court of law or equity, which is the cherished right of all English speaking peoples.

Furthermore the treaty expressly provides that the Commission shall "report" on other matters referred to it but that "Such reports * * * shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award." (Article IX, Treaty of 1909.) Obviously the private claimant is left without adequate means of redress under the treaty, if the narrow construction of Article II is adopted.

It is significant that in its report on this very reference the International Joint Commission did not undertake to redress the landowners' grievances for the past unlawful use of their lands. It required another treaty, the treaty of 1925 to give redress for the past flooding of these lands.

It is respectfully suggested that a broad construction of Article II of the treaty is in the best interest of both governments and of their respective inhabitants, for the treaty applies generally to all boundary waters.

Rights Under General Law

It is Petitioners' belief and claim that, on the peculiar facts applicable to the Lake of the Woods claims, the owners of the flooded American shorelands have a cause of action in the Canadian Courts under

general law and without relying on Section II of the treaty.

We respectfully submit that the record proves that the Canadian Government has violated its contractual obligation, contained in Article IV of the treaty, not to "permit" the maintenance of dams in boundary waters which will raise the natural level of such waters. By so doing the Canadian Government has occupied and used Petitioners lands, and the other shorelands, for its own purposes and for the purposes of its residents and industries. We must therefore squarely dissent from the statement relied upon as the foundation for the very learned and exhaustive argument contained in the Brief of the Government of Canada, on page 129, where it is written:

> "There is no suggestion in the record of any contract on which the Crown could be sued. There is no suggestion that the Crown had taken possession of the landowners lands—"

It is respectfully submitted that the Treaty was a contract not only for the benefit of the High Contracting Parties but also for the benefit of their respective inhabitants. The Canadian and English cases recognize that a breach of a contractual agreement gives rise to a cause of action in a foreign jurisdiction, although no such right exists for a tort.

Yates v. The King, 20 Ex. C. R. 175.

No criticism is intended of the friendly Government of Canada by the statement that it violated Article IV of the treaty. It is universally conceded that no Government excels the Government of Canada in its observance of National honor and treaty obligations. Its sense of equity and justice is equally noteworthy and

generally recognized. Indeed it may be said that more serious complaint was not made by petitioners against the unlawful use of their lands because it was recognized that the temporary violation of the treaty enabled these shorelands to be devoted to their most profitable and best adapted use and because it was commonly understood on both sides of the boundary, that just compensation ultimately would be paid for such use; and to that end provision was made in the treaty of 1925.

But we are now dealing with a question of technical rights, rights which must be redressed, for otherwise, as stated by Judge Booth, "it would be a reproach to both Governments concerned." (R. 433) The Government of Canada in the treaty of 1925 justly conceeded petitioners rights arising from the past flooding of their lands. By the same treaty both Governments necessarily conceded that a wrong had been done upon which Petitioners conceded rights were based.

Petitioners do not claim a right, recoverable only under some unusual provision of the Canadian law. If such were the case, the foreign law would need to be pleaded and proved, as claimed for Respondent. But here it is not necessary to put the foreign law in evidence because Petitioners' rights are not conditioned upon it. They are based upon the treaties of 1909 and 1925 which are in evidence, and upon general law which is the same in both countries. It is only where foreign law is claimed to be different that it is necessary to prove it, otherwise it will be presumed to be the same as the law in this country. The burden is on Respondent to prove that the Canadian law differs from the general law as stated and applied by this Court.

It is respectfully urged that because Petitioners rights are conceded, and spring from the breach of treaty obligation, and because on the facts in this rec-

ord an action for trespass will lie on the authorities cited in Petitioners Brief pp. 48-52, and because Petitioners' lands were occupied and used by the Government of Canada, Petitioners had a cause of action enforceable in the Courts of Canada, as well as by Petition of Right.

As to the Materiality of Petitioners' rights, due to the past unlawful use of their land, in Estimating Market Value.

It appears to be well settled that the unauthorized use of Petitioners' lands gave Petitioners the right to be paid fair compensation for such use.

Utah Power & Light Co. v. U. S., 243 U. S. 389.
Pacific Gas & Electric Co. v. U. S., 45 F. (2d) 708.
U. S. v. Bernard, 202 Fed. 728.
Wolfe v. Mayer Bros., 171 Minn. 98, 213 N. W. 549.
Weaver v. Miss. and Rum River Boom Co., 28 Minn. 534, 11 N. W. 113, 28 Minn. 542, 11 N. W. 114.
Sutherland on Damages, Vol. 4, p. 3746, Sec. 1014.

It is equally well settled that the consideration payable for the use of property must be considered and paid for in estimating and paying just compensation.

Monongahela Navigation Co. v. U. S., 148 U. S. 312, 328.

"The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner. *For each separate use of ones property by others, the owner is entitled to a reasonable compensation;* and the number and amount of such uses determine the productiveness and the earnings of the property, and, therefore, largely its

value. So that *if this property, belonging to the Monongahela Company, is rightfully where it is; the company may justly demand from every one making use of it a compensation;* and to take that property from it deprives it of the aggregate amount of such compensation which otherwise it would continue to receive." (Italics supplied by counsel)

Accord

Northern Pacific Ry. Co. v. North American Telegraph Co., 230 Fed. 347 (C. C. A. 8th).

Obviously the amount paid is not controlling in the application of the principle. That Petitioners and other shoreland owners are entitled to some compensation for the flooding of their lands is conceded by the Treaty of 1925, and the acts of Congress giving effect thereto.

It is respectfully submitted that, on the established facts and the decisions of this Court, Petitioners' right to collect compensation for the past flooding of their lands, and the fact of the use which their lands had actually served for the past 30 years should have been considered in determining their market value.

The claim on behalf of Respondent that Petitioners' rights are barred by adverse user is untenable for the reason that such past user has never been under any claim of right or of ownership. It has never been hostile to Petitioners' right or title, and never claimed to exclude Petitioners therefrom. It has not been continuous but has been interrupted by years of low water. (R. 213) All of which are fatal to the claim of adverse user under Minnesota law which must control in such matter. Furthermore any such claim is expressly negatived by the Treaty of 1925 where Petitioners' undiminished rights are recognized.

VII. It is suggested that Respondent may have some right paramount to Petitioners by reason of the Indian Appropriation Acts. (Brief for U. S. pp. 27, 28) It is respectfully submitted that this question is not before the Court. The Rights of the United States under the Indian Acts were litigated and decided adversely to Respondent in

U. S. v. Wheeler Township, 66 F. (2d) 977.

No action was taken to review the decision, consequently, on the record and briefs before the Court in these proceedings, questions arising under the Indian Acts are not available to Respondent.

CONCLUSION.

Petitioners respectfully urge for the Court's consideration the conclusions submitted in their original brief, and for the reasons discussed in said brief.

Each of the points on which Petitioners' prayer for a new trial is based is independent of the other points. If the Court shall find that Petitioners' claim as to any one, or more, of said points is valid, then Petitioners' prayer should be granted.

Respectfully submitted,

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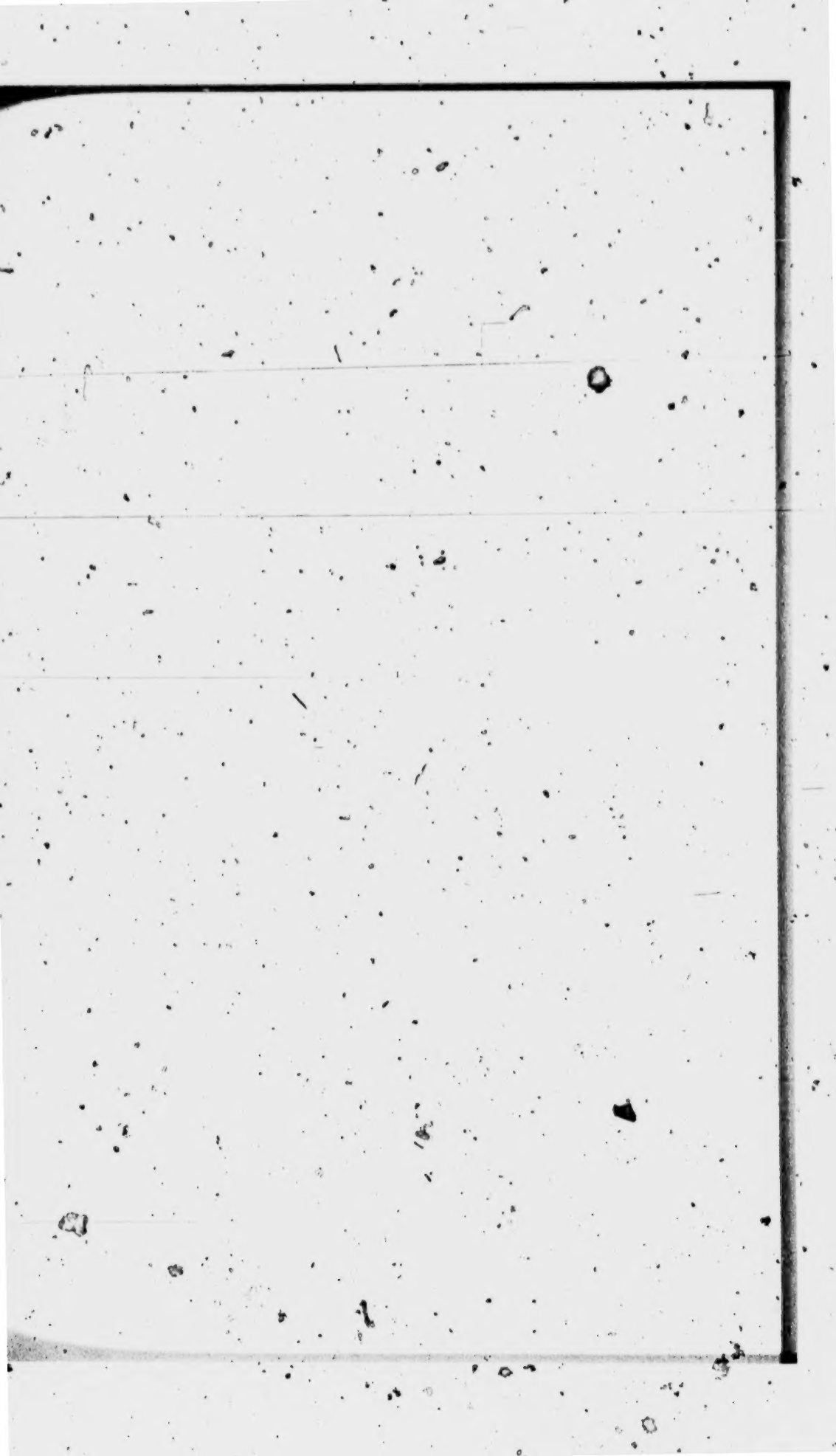

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Treaties and Statutes involved	3
Statement	3
Argument:	
Corrections in "Established Facts" of Petitioners' Brief	9
I. Response to petitioners' Point I:	
1. Treaty of 1909 is not involved	15
2. If treaty had been applicable it would have created no right of redress for the flowage	16
3. If treaty had conferred right of action it begs the question to say that reservoir values are thereby established	18
4. All responsibility of Canada for fluctuation of the levels of the Lake of the Woods has been removed by Treaty of 1925	19
II. Response to petitioners' Point II:	
The decision below is not in conflict with *Ford Hydro-Electric Company* v. *Neely*, 13 F. (2d) 361, and *Weiser Valley Land & Water Co.* v. *Ryan*, 190 Fed. 417	20
III. Response to petitioners' Point III:	
The decision below is not in conflict with *Boom Co.* v. *Patterson*, 98 U.S. 403, and *United States* v. *Chandler-Dunbar Company*, 229 U.S. 53	25
IV. Response to petitioners' Point IV:	
The decision below is not contrary to the provisions of the Treaty of 1925 and the Act of May 22, 1926	30
V. Response to petitioners' Point V:	
There is no conflict between the instant decision and the local law of Minnesota	32
Conclusion	33

CITATIONS

Cases:	
Adams v. *C. B. & N. Ry. Co.*, 30 Minn. 286, 39 N.W. 629	33
Boom Company v. *Patterson*, 98 U.S. 403	25, 28
Conan v. *City of Ely*, 91 Minn. 127, 97 N.W. 737	33
Ford Hydro-Electric Co. v. *Neely*, 13 F. (2d) 361	20, 21, 22, 23

Cases—Continued. Page
Garrison v. *City of New York*, 21 Wall. 196 ..... 13, 27
Kerr v. *South Park Commissioners*, 117 U.S. 379 28
McGovern v. *New York*, 229 U.S. 363 ..... 8, 28, 29
Minneapolis St. P. R. & D. Elec. T. Co. v. *Searle*, 208 Fed. 122 33
New York v. *Sage*, 239 U.S. 57 ..... 13, 21, 28, 30, 34
Searl v. *School District*, 133 U.S. 553 ..... 12, 23, 27
Sisters of Charity v. *The King*, L.R. (1922) 2 A.C. 315 18
Union Electric Light & Power Co. v. *Snyder Estate Co.*, 65 F. (2d) 297 ..... 24, 25
United States v. *Chandler-Dunbar Co.*, 229 U.S. 53 ..... 25, 28
Weiser Valley Land & Water Co. v. *Ryan*, 190 Fed. 417 ..... 22, 23
Yates v. *The King*, 20 Ex.C.R. 175 17
Treaties and Statute:
Treaty of 1842, 8 Stat. 572 6
Treaty of 1909 between the United States and Great Britain, 36 Stat., Part II, p. 2448 3
Treaty of 1925 between the United States and Great Britain, 44 Stat., Part III, p. 2108 3
Act of May 22, 1926, c. 364, 44 Stat. 617, as amended by Act of April 18, 1928, c. 379, 45 Stat. 431 3
Miscellaneous:
67 Cong. Rec. 7916 32
Hearings before House Com. on Foreign Affairs on H.R. 9872, 69th Cong., 1st sess., p. 28 32
Final Report, International Joint Commisson on Lake of the Woods 4, 8

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 580

ELIAS A. OLSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 581

RANDOR G. KARLSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 582

HARRY BREWSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court.[1] The charge to the jury appears at R. page 126.

[1] In November 1929, ten Lake of the Woods cases were tried before District Judges Cant and Sanborn, who filed a

The opinion of the Circuit Court of Appeals appears at R. 417–429. The dissenting opinion is at R. 429–439. The opinions are reported in 67 F. (2d) 24.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 21, 1933 (R. 439–440). The petition for certiorari was filed November 10, 1933. Petitioners invoke the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The question presented may be best expressed in the language of the Circuit Court of Appeals (R. 419):

> But one main issue is involved in these appeals. It is raised in the record in various

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decision and supporting memorandum in October 1930, in which they held that reservoir adaptability had no influence upon the market value of the lands condemned either in fact or in law. This decision is not reported. It is filed in the office of the Clerk of the United States District Court for Minnesota at Duluth, *sub nom. United States of America* v. *Various Tracts of Land in Roseau and Lake of the Woods Counties*, Appeal of Alfred M. Lawson et al., Law 539 (1549).

Thereafter the same issue was presented in the instant cases before Judge Sanborn, sitting with a jury. The cases therein passed on are companion cases to the present ones. An appeal was taken from the judgment of Judges Cant and Sanborn. Such appeal has been kept in abeyance pending the decision in the present cases.

> ways—by exclusion of evidence, refusal to charge and the charge to the jury. The issue is whether the use of these properties for flowage purposes is such a use as, *under the circumstances here,* can be considered as an element of that value for which compensation must be made. (Italics ours.)

If the evidence was rightly excluded no complaint could be made with reference to the charge. The question presented therefore is essentially this: Was testimony of potential utility of petitioners' tracts of land to water power development admissible as evidence of its value under the circumstances of this case?

TREATIES AND STATUTES INVOLVED

> Treaty of 1925 between the United States and Great Britain in respect to Canada, 44 Stat. Pt. 3, p. 2108;
>
> Treaty of 1909 between the United States and Great Britain with respect to Canada, 36 Stat. Pt. 2, p. 2448;
>
> Act of May 22, 1926, c. 364, 44 Stat. 617, as amended by Act of April 18, 1928, c. 379, 45 Stat. 431.

Pertinent parts of the treaties and statutes as amended are set forth in the appendix to petitioners' brief.

STATEMENT

This is a proceeding instituted by the United States under the provisions of the Lake of the Woods Act (May 22, 1926), c. 364, 44 Stat. 617,

as amended April 18, 1928, c. 379, 45 Stat. 431. The estate condemned is an easement of flowage upon the shores of the Lake of the Woods. The Lake of the Woods is a large body of water, partly in Canada and partly in the State of Minnesota. The surface area of the lake is approximately 1,500 square miles, with its outlet by the Winnipeg River in Canada.

In 1898, the Keewatin Power Company (a Canadian corporation) by agreement with the Crown, constructed for purposes of navigation a control dam (the Norman Dam) in Canada near Kenora. (R. 237, 417.) It utilized the lake as a reservoir and caused an average rise in the lake level of about three feet, with resulting invasion of shore lands. The flooding of the shore lands has intermittently continued since 1898 and is substantially the level to be maintained hereafter. The lands or easements involved here are the shore lands so affected.

In 1909, a treaty was entered into between the United States and Great Britain with respect to Canada "relating to boundary waters" which created the International Joint Commission, with jurisdiction over such waters. (36 Stat. Pt. 2, pp. 2448, 2451.)

Shortly thereafter the Lake of the Woods situation was referred to the Commission. After extensive studies, the final report of the Commission was submitted to the two Governments in 1917. (Final Report of the International Joint Commission.) As a result, in 1925 a treaty was entered into

between the United States and Great Britain in respect to Canada "to regulate the level of the Lake of the Woods" and putting into effect the recommendations of the International Joint Commission, with a flowage easement on the Minnesota shore lands to be acquired. (44 Stat. Pt. 3, p. 2108.)

To carry into effect this treaty the Act of May 22, 1926, 44 Stat. 617, as amended by the Act of April 18, 1928, 45 Stat. 431, was passed, in which the Secretary of War was required to acquire, by purchase or condemnation, "flowage easements up to elevation 1,064 sea-level datum upon all lands in such State [Minnesota] bordering on the Lake of the Woods, Warroad River, and Rainy River, * * *"

Being unable to secure these flowage rights on various tracts by purchase, a condemnation proceeding was instituted in which was included lands owned by these petitioners.

Commissioners appointed by the District Court for Minnesota in the condemnation proceedings made awards from which the present petitioners appealed to the District Court, where their cases were consolidated for trial (R. 21) for the purpose of tendering an issue of law as to the admissibility of evidence of the contribution of Lake of the Woods to the development of hydroelectrical power on the Winnipeg River and the advantage to such development that might be derived from the storage of water on the shores of the lake. This

testimony was proffered (R. 162) upon the theory that compensation should be made on the basis of "reservoir values" of the shore lands.

When this testimony was presented the United States objected (R. 25), and moved the court (R. 136) for leave to offer evidence as a foundation for its objection. This motion was granted (*ibid.*) and the Government laid before the court all of the physical characteristics of the lake, with a shore line, including islands, of over 3000 miles (R. 138), comparable to the shore mileage of our Great Lakes. The Government also proved the multiplicity and diversity of titles in the Governments and citizens of the United States and Canada, Minnesota, Manitoba, and Ontario, and in many Indian Tribes in Canada, and the resulting *impracticability of effecting the unification of ownership requisite to its use as a storage reservoir;* the conflict of interests, public and private, in the uses of these international waters for navigation, fishing, domestic and sanitary uses, lumbering, agriculture, and water power, each of which could invoke the protection of the Webster-Ashburton Treaty of 1842 (8 Stat. 572), and the Boundary Waters Treaty of 1909 (36 Stat. Pt. 2, 2448), through one of the five sovereignties involved; two nations (Canada and the United States), two provinces (Manitoba and Ontario), and one State (Minnesota), so that there was no reasonable prospect that any demand should arise for water power uses of the lake, because under the circumstances here, it was *impossible to*

secure authority to regulate the level of the lake without international negotiations for the protection of the various public and important private interests, and the acquisition of flowage rights under governmental sanction (eminent domain). It was likewise shown by original Government Exhibit No. 64, the pertinent parts of which are printed at R. 237, that the *Dominion of Canada* as early as June 22, 1898 (before ever the lands on the American side of the lake were opened for homestead entry (R. 210)), *had become vested with the power and authority to control the outlets of the lake in the interests of navigation.* Inasmuch as outlet control was essential to make level control and the union of necessary properties of any use to the one who secured them, the control of the outlets in the interest of navigation, removed the possibility of securing outlet control for water power purposes. Hence water power utility of the shore lands was not an element of value for which compensation should be made.

Finally, as a further foundation for its objection to the testimony concerning "water power values", the Government showed that *the lands condemned,* by virtue of the laws under which they were opened for *homestead entry, were subject to the right of the United States to overflow them to indeterminate levels in aid of navigation* without payment of compensation. (R. 32.) The court sustained the Government's objection to the introduction of

petitioners' evidence of water power values (R. 27), and withdrew from consideration by the jury (R. 130, marg. 166), as an element of value for which compensation should be made, the physical possibility that petitioner Olson's land, comprising 56 acres out of a total of 78,081 acres (R. 98, 160), could be used in conjunction with over 1500 privately owned tracts (United States 850 (R. 137), Canada 723 tracts (R. 225), and the lands of two nations[2] (R. 163), two provinces, *ibid.*, one State (R. 163) and many Indian Tribes (R. 224, 261, 263, Map)), as a part of a reservoir for the storage of water to make the potential power of falls in the Winnipeg River available both in dry seasons and in wet, to persons who might construct the facilities for that purpose.

An appeal was taken from the judgment of the District Court to the Circuit Court of Appeals for the Eighth Circuit, which affirmed the judgment (R. 429), Circuit Judge Booth dissenting. The sole ground relied on by the court was that the possibility of assembling the numerous tracts requisite for use of the shores as parts of a reservoir was too remote and speculative to have any legitimate effect upon values (*McGovern* v. *New York*, 229 U.S. 363, 372); and "with no further examination of the difficulties urged by appellee" held that "the trial court correctly excluded consideration of this flowage use as an element of value". (R. 428.)

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[2] Final Report, International Joint Commission on Lake of the Woods, p. 61.

This case comes before this Court upon a petition for writs of certiorari directed to the Circuit Court of Appeals for the Eighth Circuit.

ARGUMENT

Petitioners' "Statement" is followed by a recital designated in their brief as "ESTABLISHED FACTS", which requires certain corrections. So far as material to the issues now raised these corrections are as follows:

1. At page 6 of their brief petitioners state:

> The storage reservoir [for hydroelectrical purposes] has been maintained and used intermittently since that date [1898] (R. 22, 24).

The evidence cited merely states that when the Norman Dam was built in 1898 it was for the purposes of power development and *at that time* it created a power storage reservoir in Lake of the Woods. What petitioners fail to show is that on June 22, 1898, the Dominion of Canada assumed control of the Norman Dam by "Agreement Between the Crown * * * and Keewatin Power Company" (R. 237) for the express "purpose of improving the navigation of the said lake [of the Woods]". *Subsequently* (October 13, 1898, and June 15, 1904, R. 210) lands on the American side were opened for homestead entry; and it was not until 1926 (a year after the treaty permitting fluctuation of levels) that the Norman Dam was used

for power purposes. The idea that the lake has been used as a storage reservoir for power purposes has, therefore, no support in the undisputed testimony in the record.

2. The statement, at page 6 of petitioners' brief, that—

> It [the storage reservoir] has increased the power capacity of the Canadian hydro-electric plants in the Winnipeg River by about fifty per cent or approximately 200,000 continuous horse-power (R. 35, 50)—

may be corrected by an exact quotation of the evidence (R. 35):

> 4-c. Respondents further offer to prove by said witness that the continuous power that could be developed at the outlets of the lake, with the lake utilized as a storage reservoir and the waters controlled as contemplated by the treaty, would be increased, as compared with natural conditions, in the same relative proportion as the average dependable outflow, that is, about 50%.

The citations of petitioners show on their face that the electrical plants referred to in the testimony are not the existing plants, but mere "projects" (R. 50).

3. At page 7 of their brief petitioners state:

> Under the easement acquired pursuant to Treaty, said lands will continue to be subjected to practically the same *use* and burden as during the past thirty years (R. 22–23). (Italic ours.)

The fact is that while the "burden"—the extent and frequency of flowage—will be about the same under the treaty as under the control for navigation purposes by the Government of Canada (R. 22–23), the *use* will be for the aggregate of purposes set forth in Article II of the Treaty of 1925. The point is, that it is not correct to say the lands have been used for power storage during the past thirty years.

4. The testimony noted on page 7 of petitioners' brief that—

> It would have been entirely practicable for the * * * competing interests to have acquired said flowage easement—

while contained in a rejected offer of proof, obviously states a conclusion of law. The point made by the witness is the very point at issue in the case: whether any prospective bidder existed whose demand for the use could enhance the value of the lands for that use. That question was for the court, not for the witness.

5. The following statement at pp. 7–8 of petitioners' brief is based upon offers to prove (R. 59) that higher prices were paid for shore lands because of the fact "that the land was valuable and was reputed to be valuable for flowage and storage purposes"—

> Because of the adaptability and actual use of said shore lands for reservoir purposes, and the general interest created therein, their

> market value was increased and higher prices paid for them (R. 58–59, 64–66, 68–69, 71–72, 105–106).

Strictly speaking, the petitioners' statement should read:

> Because of the *reputed* adaptability and the *supposed* actual use of said shore lands for reservoir purposes, etc.

higher prices were paid; but substantially the offer of proof cited would have to be answered by the following argument:

1. A mistake of fact as to the elements contributing value to property does not justify evidence in court of the elements erroneously considered by buyers. Hence, if the barriers to reservoir use of the shore were such as to make a realization of that use speculative and conjectural, a mistaken belief of buyers that the land was worth more because of such utility, does not make such utility any the less speculative. The fact that buyers were deceived as to the practical possibilities of creating a reservoir does not justify proof of such possibility, if as a matter of law it could not occur.

2. In any case the "higher prices" paid were induced by hope of a governmental taking. Any rise in values caused by the expectation of public expropriation must be left out,—otherwise we destroy the function of eminent domain as a sovereign right to secure a public improvement at a cost that is just to the public (*Searl* v. *School District,* 133

U.S. 553, 562; *Garrison* v. *City of New York,* 21 Wall. 196, 204) as well as the landowner. That values arising because of particular improvement cannot be included in compensation is shown by the cases cited by the Circuit Court of Appeals in its opinion (R. 428). The decision in *New York* v. *Sage,* 239 U.S. 57, 61, also makes that point clear. Mr. Justice Holmes there said:

> Any rise in value before the taking, *not caused by the expectation of that event,* is to be allowed * * *. (Italics ours.)

If "higher prices" were paid because of reputed reservoir values, the enhancement was caused by the expectation of a taking by the Government. This may be inferred from the following circumstances:

While the landowners offered to prove certain sales prior to the treaty which authorized the artificial levels of the lake, no offer of proof was made of any sale prior to the reference to the International Joint Commission of the question of the most advantageous use of the waters of the Lake of the Woods. This reference was in 1912 (Final Report of the International Joint Commission on the Lake of the Woods Reference), and it was the question of reference, the investigation and hearings of the Commission and the recommendations for a treaty substantially as signed in 1925, that induced the belief that money could be made

by obtaining lands on the shores of the lake. All of the offers of proof referred to at page 49 of appellants' brief in the Circuit Court of Appeals, excepting the offer by the witness Olson (R. 97) refer specifically to "lands below 1064". This contour line was the level that was discussed by and before the International Joint Commission as the probable upper limit of the easement of flowage. It was not finally fixed, however, until the Treaty of 1925 was signed. This circumstance tends to show that it was the treaty that induced purchase of flowage lands. But even if enhancement occurred before the treaty was signed, it occurred because of the steps looking toward a governmental taking, and in principle the decisions which forbid the inclusion of values arising from the improvement should forbid the inclusion of reservoir value as an element of damage in this case.

The brief in support of the petition for certiorari, page 8, relies on evidence that persons actually paid more for land because of reputed flowage value. While it is true that such payments, according to the offers of proof, were made prior to the treaty, the evidence was nevertheless inadmissible because the enhanced prices were paid in the hope of reimbursement as a result of a governmental taking.

RESPONSE TO PETITIONERS' POINTS

I

Under Point I of their argument petitioners assert (pp. 15–16):

> The decision of the Circuit Court of Appeals by a divided Court, has construed the *Treaty* of 1909 to mean that American property owners whose property is damaged on the American side because of interferences with boundary waters on the Canadian side of the boundary, have no right either to enjoin the trespass or to recover damage therefor.
>
> That construction of the Treaty is necessary to the decision of the majority of the Court. No other reason is given for excluding from consideration the actual use value, which the Court has found to exist in fact.

The answer to this claim is four-fold.

1. The Treaty of 1909 is not involved.

This is shown by the last clause of the following excerpt from Article II of the treaty which is omitted from petitioners' argument on the point and as it is quoted in Judge Booth's dissenting opinion (though set forth in the "pertinent parts" quoted in petitioners' Appendix A):

> ARTICLE II. * * * any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured

> parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; *but this provision shall not apply to cases already existing, or to cases expressly covered by special agreement between the parties hereto.* (Italics ours.)
>
> * * * * *

Now, the trespass relied on was a "case already existing" when the Treaty of 1909 was made. This is shown by the record (R. 22), and by the following statement of the dissenting opinion (R. 430):

> Both the building of the Rollaway dam in 1887 and the building of the Norman dam in 1895–98 had produced trespasses by flowage upon the lands here involved. These trespasses were committed either by private parties or by private parties jointly with the Canadian government. They continued down to the time of the present condemnation proceedings. These trespasses are conceded in the majority opinion, and it is further conceded that these trespasses established the physical adaptability of the lands for flowage purposes.

Manifestly there is no occasion for involving the Treaty of 1909 in the discussion or seeking its construction by the Supreme Court, for it has no application to cases "already existing" when the treaty was made.

2. If that treaty had been applicable to "cases already existing" it would have created no right of redress for the flowage in this case.

In cases not "already existing" the treaty confers "the same rights and entitle the injured parties to the same legal remedies *as if such injury took place in the country where such diversion or interference occurs*" (italics ours). The treaty right, therefore, is a right that the owners of property in Canada would have if the injury took place there. While the Crown permits redress of grievances by Petition of Right, as indicated in the dissenting opinion of Judge Booth, such an action does not lie for this character of tort.

In his judgment in the case of *Yates* v. *The King*, 20 Ex.C.R. 175, where the suppliant, by his Petition of Right, claimed to be the owner of certain lands in the Town of New Liskeard, which were overflowed and flooded as a result of the construction, in 1912, of a dam at the southern end of Lake Temiskaming, by the Department of Public Works of the Dominion of Canada, Audette, J. stated (p. 177):

> The action is for the recovery of damages to land and is therefore in its very essence one sounding in tort. Apart from breach of contract or from special statutory authority, no such action will lie against the Crown * * *.
>
> The respondent, in the present case, has not expropriated (The Expropriation Act, R.S.C. 1906, ch. 143, sec. 2, sub-section f.—sec. 3) the easement to flood the suppliant's land and it therefore follows that the Court has no jurisdiction to entertain the claim under the Expropriation Act.

See also *Sisters of Charity* v. *The King*, L.R. (1922) 2 A.C. 315.

Therefore, the Treaty of 1909 created no right of redress for the flowage as a result of interference with the waters of the lake on the Canadian side by the Canadian Government for the improvement of navigation (R. 237).

3. Assuming that the treaty conferred a right of action for trespass by flooding it begs the question to say that reservoir values are thereby established, unless such values could be recovered in an action under the treaty. Evidence of such values would be inadmissible in an action under the treaty for the same reason that they were held inadmissible in this case; valuations based on reservoir utility of land would be speculative and conjectural, because the diversity of titles was such as to make unification out of the question. Hence the assumption of a right of action under the treaty begs the question of admissibility of reservoir values. If this treaty applied at all it would merely give a right to recover for the actual physical damage to the shore lands by water. It does not give those lands a market value for reservoir purposes, if they could have no such value to a buyer or seller of individual tracts. And if the possibility of union of tracts necessary for a reservoir was too remote to influence market values no damages could be recovered on that basis. Accordingly, the Treaty of 1909 has no bearing on the issues of this case in any view.

It should be further noted that petitioners are quite wrong in saying (Br., p. 16) "no other reason is given [than the Treaty of 1909] for excluding from consideration the actual use value, which the Court has found to exist in fact."

The reasoning of the lower court detailed in the record (pp. 423 to 428) shows that the principles on which the decision rests, viz., that uses which are "too remote and speculative to have any legitimate effect upon the valuation" are to be excluded; and that potential uses "are remote and speculative if the use depends upon the union of numerous tracts, variously owned, and such union is improbable * * *" (R. 426).

4. Finally, all responsibility of Canada for fluctuation of the levels of the Lake of the Woods has been removed by the following provision in Article IX of the Treaty of 1925:

> The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.
>
> * * * * * *

Petitioners' sweeping statement (Pet. Br., p. 17) that the present "decision is of far-reaching importance in the harmonious relationship between the United States and the Dominion of Canada" is quite out of place in this case, for our relationships with Canada on this score have been set at rest by

the Treaty of 1925. Hence, no occasion whatever is presented for a construction by the Supreme Court of the Treaty of 1909.

II

Under this head petitioners state (p. 17):

> The Circuit Court of Appeals' decision squarely conflicts with *Ford Hydro-Electric Company* v. *Neely,* 13 Fed. (2nd) 361, Seventh Circuit, and with *Weiser Valley Land & Water Company* v. *Ryan,* 190 Fed. 417, Ninth Circuit.

From an examination of the *Ford* case it appears that petitioner's claim involves an obvious misapprehension of the holding both in the *Ford* case and in the instant case. The holding in the *Ford* case is that (p. 362) "where the lands sought to be condemned are not the whole of the lands needed, but only a part thereof * * *", that fact standing alone is not a conclusive ground for excluding evidence of reservoir value. Nothing in the decision of the court below in the instant case impairs in any degree the decision in the *Ford* case. On the contrary, the decision below is in strict accord with the *Ford* case in recognizing (R. 425) that potential uses may be taken into account even though such uses can be made only in connection with other tracts, provided that the possibility of union of the necessary properties is considerable enough to be a practical consideration.

In the *Ford* case, counsel for the condemnor took the position that the utility of the lands for a special purpose could *never* be shown if such utility was available only in conjunction with other lands.

The Supreme Court had expressly held in *New York* v. *Sage* (1915), 239 U.S. 57, 61:

> The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price.

The test therefore *is not* whether the use relied on is possible only in conjunction with other tracts, but *whether "the union of properties necessary is so practicable that the possibility would affect the market price."*

In the instant case the Government proved the impracticability of union of titles as a foundation for its objection to testimony of potential utility (R. 138 *et seq.*); in the *Ford* case the condemnor relied solely on the bare fact that such utility required union of titles to the lands in suit with other lands. That circumstance alone does not make evidence of potential utility incompetent; but when it is proved that the chance of unification is impossible of realization, then diversity of titles is a bar to evidence of potential uses which have no value without unification.

In the instant case the court held that the possibility of union was not so practicable as to affect

market prices, and the evidence of the impracticability of uniting titles was deemed conclusive.

In the *Ford* case, on the other hand, plaintiff in error "planted itself upon the incompetency of evidence" upon the sole ground (without laying a foundation for the objection by first proving the impracticability of union) that the witness "considered the lands as a part of a united whole * * *". (P. 362.)

The *Ford* case merely holds that such testimony is not *per se* incompetent.

Such testimony may obviously become incompetent when proof is made that a "united whole" is impossible of realization save by international agreements and eminent domain proceedings in which the question is raised.

The *Ford* case is, therefore, not in conflict with a decision which holds that the evidence conclusively shows the impracticability of so uniting all the lands as to impart a fractional market value to petitioners' segment as part of a completed reservoir.

In *Weiser Valley Land & Water Co.* v. *Ryan*, 190 Fed. 417, the question of multiplicity of titles was not raised in any form, either as a bar *per se* to evidence of the availability of lands for uses that were possible only in conjunction with others, or on the ground that the possibility of union was too remote to influence market values. So far as the opinion shows, only two titles necessary for a

reservoir were outstanding (p. 418). As to the measure of damages, the court simply states (p. 421):

> The proper basis of inquiry is, What were the lands worth in the market? And this establishes the measure of damages.

The *Ford* case, the *Weiser Valley* case and the instant case all conform to the settled principle laid down by the Supreme Court in *New York* v. *Sage* (239 U.S. 57, 61):

> The decisions appear to us to have made the principles plain. No doubt when this class of questions first arose it was said in a general way that adaptability to the purposes for which the land could be used most profitably was to be considered; and that is true. But it is to be considered only so far as the public would have considered it if the land had been offered for sale in the absence of the City's exercise of the power of eminent domain. The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price. But what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with

> other lots. The City is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain. Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give.

Manifestly, this is the very rule of the decision which governed in the *Ford* and *Weiser Valley* cases, and which the lower court specifically applied when it held (R. 427–428):

> To assemble all of this flowage affected land would require acquisition of the rights of this great number of persons (including two Nations, one State, two Provinces, Indian Tribes and private persons) in this large number of separately and variously owned tracts. We cannot think that such an eventuality held that degree of probability or possibility which could affect the value of these lands and be an influence or consideration affecting, in the slightest degree, the minds of sellers and buyers thereof in arriving at a fair price therefor. Such use is too remote and speculative to have such effect in fact and, therefore, can have none in law.

Petitioners state (Br., p. 20) that in *Union Electric Light and Power Company* v. *Snyder Estate Co.*, 65 F. (2d) 297, the Circuit Court of

Appeals for the Eighth Circuit decided substantially the same question we have here, in the opposite way. Judge John B. Sanborn, who tried the present case in the District Court, was one of the judges of the Circuit Court of Appeals who sat on the *Union Electric* case. A mere inspection of the opinion (p. 304, paragraphs 14–17) shows that the special use there relied on was in no sense speculative, but, on the contrary, the property was already partly developed for such use, and the unification of titles was not involved. The court declared (p. 304) that—

> the admission of evidence touching the value of property appropriated in condemnation cases must be left largely to the discretion of the trial judge.

III

Point III alleges a probable conflict of the decision below with *Boom Company* v. *Patterson*, 98 U.S. 403, and *United States* v. *Chandler-Dunbar Company*, 229 U.S. 53. To support this claim petitioners state (Br., p. 21):

> The majority of the Circuit Court of Appeals decided that *where the special use is possible only through the exercise of eminent domain it must be excluded from consideration in estimating value.* This holding is in conflict with the decision of this Court in *U.S.* v. *Chandler-Dunbar Company, supra*, and *Boom Company* v. *Patterson, supra.*

If the statement in bold face type (italics *supra*) means what it says, it is sound law and not in conflict with the decisions cited by the petitioners; for eminent domain is never allowed to enhance the values awarded in the eminent domain proceedings.

Apparently petitioners meant to attribute to the Circuit Court of Appeals this holding:

> Where the special use is possible only through the exercise of eminent domain, it (*the special use*) must be excluded from consideration in estimating value.

This is not the law declared by the court below. The lower court's holding is plainly expressed in the following statement at the conclusion of its detailed discussion of the authorities (R. 426):

> The things we deem material to bear in mind in the foregoing statement of the law are that existing uses influence values; that potential uses are not considered if they are remote and speculative; that they are remote and speculative if the use depends upon the union of numerous tracts, variously owned, and such union is improbable and that *in determining such probability the power of eminent domain must be excluded.* (Italics ours.)

The holding, therefore, obviously is this: The power of eminent domain is not a factor to be considered in estimating the *probability of union* of tracts necessary for a special use.

In other words, the lower court held that eminent domain is not a relevant consideration in

determining whether the possibility of union of properties necessary is so practicable that such possibility would affect market price. This is quite different from the holding expressly alleged by petitioners that eminent domain must be left out in estimating value, if it is the only means of making a special use possible. It is also quite different from the holding petitioners apparently intended to ascribe to the court, namely, that the necessity of employing eminent domain to acquire the property forbids its valuation on the basis of a special use, regardless of values otherwise arising from availability for such special use.

The ultimate fact sought is fair sales value; and it is clear, *first,* that special uses may influence such value whether the property is acquired by eminent domain or by purchase; and, *second,* that the probability of acquiring all the titles necessary for a special use also influences the fair sales value of each tract. In the first case neither the necessity for nor the fact of the exercise of eminent domain forbids valuations based on special utility and the lower court did not hold otherwise; in the second case, eminent domain is not a proper factor to be considered in estimating the probability of union, for its inclusion would rob the power of eminent domain of its essence as a right to secure a public improvement at the fair market price, a cost that is fair to the public as well as to the landowner. *Searl* v. *School District,* 133 U.S. 553, 562; *Garrison* v. *City of New York,* 21 Wall. 196, 204.

Since the lower court did not declare any such principle of law as petitioners state and criticize under their Point III, an analysis of the cases they cite is unnecessary. It may, however, be noted that in two of them, *United States* v. *Chandler-Dunbar Company,* 229 U.S. 53, and *Boom Company* v. *Patterson,* 98 U.S. 403, multiplicity of titles was in no way involved; and in the *Chandler-Dunbar* case itself the Court said (p. 76):

> The value should be fixed as of the date of the proceedings and with reference to the loss the owner sustains, considering the property in its condition and situation at the time it is taken and not as enhanced by the purpose for which it was taken. *Kerr* v. *South Park Commrs.,* 117 U.S. 379, 387; *Shoemaker* v. *United States,* 147 U.S. 282, 304, 305.

Obviously this forbids the inclusion of values created by the taking itself, and *Kerr* v. *South Park Commissioners,* 117 U.S. 379, which petitioners assert broadly (Pet. Br., p. 23), does not support the lower court, in fact sustains both the lower court and the decisions alleged to be in conflict.

As for the other two cases cited under Point III, *McGovern* v. *New York,* 229 U.S. 363, and *New York* v. *Sage,* 239 U.S. 57, the following excerpts show that in each the court declared the very principle followed and applied by the lower court in this case:

McGovern v. *New York, supra,* at page 372:

> There are said to have been hundreds of titles to different parcels of that land. If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect upon the valuation. See *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago,* 166 U.S. 226, 249. The plaintiff in error was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was considerable enough to be a practical consideration and actually to influence prices. *Boston Chamber of Commerce* v. *Boston,* 217 U.S. 189, 195. In estimating that probability the power of effecting the change by eminent domain must be left out. The principle is illustrated in an extreme form by the disallowance of the strategic value for improvements of the island in St. Mary's River in *United States* v. *Chandler-Dunbar Water Power Co., anté,* p. 53.
>
> The plaintiff in error relies upon cases like *Mississippi &c. Boom Company* v. *Patterson,* 98 U.S. 403 to sustain his position that while the valuation cannot be increased by the fact that his land has been taken for a water supply still it can be by the fact that the land is valuable for that purpose. The

difficulties in the way of such evidence and the wide discretion allowed to the trial court are well brought out in *Sargent* v. *Merrimac,* 196 Massachusetts, 171. Much depends on the circumstances of the particular case.

New York v. *Sage, supra,* at page 61:

> The City is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain. Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give.

IV

As Point IV the claim is made:

> The decision of the Circuit Court of Appeals is contrary to the provisions of the Treaty of 1925, and Act of May 22nd, 1926.

No argument is offered in support of this claim except the statement (Pet. Br., p. 24) of Judge Booth in his dissenting opinion (R. 432, 438):

> That Article provided [Art. IX, Treaty of 1925]:
>
> "The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from

the fluctuations of the level of Lake of the Woods or of the outflow therefrom."

* * * * * *

The Statute above quoted (44 Stat. 617) provides for an ascertainment of damages to the landowners by reason of flowage prior to the treaty.

The rulings of the Court on the offers to prove and the charge of the Court, however, held in effect that as a matter of law there could be no such damages.

The statute referred to provides, in Section 1 (Appendix C of petitioners' brief, p. 34) for condemnation of an easement of flowage and the ascertainment of damage thereby; Section 3 (*ibid*, p. 35) directs the Secretary of War to investigate "all claims for damages caused, prior to the acquisition of the flowage easements under this Act, to the inhabitants of the United States by fluctuation of the water levels of the Lake of the Woods due to artificial obstructions * * * [to] ascertain and determine the loss or injury, if any, that may have been sustained by the respective claimants and to report to Congress for its consideration the amount or amounts he may find to be equitably due such claimants * * *."

Surely the privilege foreshadowed by this Act of recovering at the hands of Congress the amounts found to be "equitably due" for the actual physical "loss or injury" to the claimants' lands is in nowise impaired by the present decision. It may be that the Congress would be unlikely, in view of the

present decision, to award past damages on the theory that the lands intermittently affected by past flowage were valuable as segments of the reservoir site. The treaty and the act to carry it into effect never contemplated damages on that basis. The preamble of the treaty (44 Stat., pt. 3, 2108) accepts as a basis the Final Report of the International Joint Commisison. That report estimates the value of the lands affected at $164,000 (p. 39) not the "several hundreds of thousands of dollars" petitioner says are involved (Pet. Br. 12); and the Congress refused to prejudge the right to past damages at all (Hearings before House Committee on Foreign Affairs on H.R. 9872, 69th Cong., 1st sess., p. 28; 67 Cong. Rec. 7916, April 21, 1926).

No conflict of the present decision with the spirit or letter of the treaty and executing act can fairly be urged, *first,* because the decision does not preclude compensation for "loss or injury" "equitably due"; and *second,* because neither in letter nor in spirit did the treaty and act imply a right to reservoir values.

V

As Point V, petitioners allege:

> The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions of the State of Minnesota.

The effect of multiplicity of titles on values dependent on unification has never been considered

by the Supreme Court of Minnesota. But in the very case cited by petitioner, *Conan* v. *City of Ely*, 91 Minn. 127, 97 N.W. 737, the landowner was held (in the passage quoted by petitioner) "entitled to the value of his property for any use * * * *for which it would ordinarily sell in the market.*" (Italics ours.)

If, as found by the lower courts, union of the required tracts did not have "that degree of probability or possibility which could affect the value of these lands and be an influence or consideration affecting, in the slightest degree, the minds of sellers and buyers thereof in arriving at a fair price therefor" (R. 428), it is plain that the *Conan* case would not require Minnesota courts to treat the use here alleged as a use "for which it [the property] would ordinarily sell in the market." It is unnecessary to discuss *Adams* v. *C. B. & N. R. Co.*, 39 Minn. 286, 39 N.W. 629, and *Minneapolis, St. Paul R. & D. Elec. T. Co.* v. *Searle*, 208 Fed. 122. They simply hold that an easement is property, and apparently petitioners' objective is to have the flowage easement valued as the "unit" of property taken. This claim is fully answered by Judge Stone (R. 420–423). There is no conflict between the instant decision and the local law of Minnesota.

CONCLUSION

The ultimate question presented by this case was simply whether the possibility of applying the lands to reservoir uses was too conjectural to influ-

ence market prices. The lower court held that the union of properties requisite for such use was so impracticable and speculative as to preclude any influence of reservoir utility on market price. This conforms with well settled principles announced by our Supreme Court, and in no way conflicts with local law or the decisions of other Circuit Courts of Appeals. Even in 1915, when the Court decided *New York* v. *Sage, supra,* it observed: "The decisions appear to us to have made the principles plain" (p. 61).

The Boundary Waters Treaty of 1909 has no bearing on the principles followed by the lower court, for the treaty expressly excludes "cases already existing". Moreover, the United States, by the Treaty of 1925, assumed all responsibility for any damage or injury which may have theretofore resulted to it or its inhabitants from fluctuations of the level of Lake of the Woods. Hence no question of American rights under the Treaty of 1909 is involved in the case.

If, however, the Treaty of 1909 did give Americans a right of action against the Canadian Government, the damages recoverable would still depend upon the market value of the property damaged; and to say the existence of a cause of action creates or tends to establish reservoir values is to beg the question. Obviously, therefore, no foreign treaty or relationship is involved in the present case.

The ruling of the lower court was made on the simple ground that testimony which is speculative and conjectural is inadmissible; and that the effect of potential uses on value is speculative if the use depends upon assembling and composing many hundreds of legal interests so varied and diverse as to make unification thereof utterly impracticable, and to preclude the possibility that such eventuality could influence, in the slightest degree, the minds of buyers and sellers of separate tracts in arriving at a fair price.

The law followed and applied by the courts below is so elementary as to make its reconsideration by this Court quite unnecessary. The only question certiorari would bring to this Court is whether, under the facts and circumstances here involved, the possible effect on value of potential reservoir uses of the lands was or was not too remote and speculative in fact to have any effect in law. That question, particularly in view of the prior decisions of this Court, is unworthy of review.

Respectfully submitted.

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Treaties and statutes involved	3
Statement	3
Summary of argument	10
Argument:	
I. "Reservoir value" was nonexistent in fact and was therefore properly excluded	12
II. The actual flooding of the lands in the past does not show or tend to show that they had a "reservoir value"	17
III. Rights of action for prior flooding	26
IV. The decision below does not conflict either with the treaty or the Act	31
V. The decision below is not in conflict with the local law of Minnesota	33
Conclusion	34
Appendix	36

CITATIONS

Cases:	
Adams v. *C.B. & N.R. Co.*, 39 Minn. 286	34
Conan v. *City of Ely*, 91 Minn. 127	34
Kerr v. *South Park Commissioners*, 117 U.S. 379	25, 26
McGovern v. *New York*, 229 U.S. 363	13–14, 25, 26
Minneapolis, St. Paul R. & D. Elec. T. Co. v. *Searls*, 208 Fed. 122	34
Mississippi Boom Co. v. *Patterson*, 98 U.S. 403	12
New York, City of v. *Sage*, 239 U.S. 57	14–15, 25
Pigeon River Improvement Co. v. *Cox*, decided January 15, 1934, No. 126, present term	8
Sargent v. *Merrimac*, 196 Mass. 171	26
Shoemaker v. *United States*, 147 U.S. 282	25
United States Statutes:	
Chippewa Lands Act of January 14, 1889, c. 24, 25 Stat. 642	28
Indian Appropriation Act of June 7, 1897, c. 3, 30 Stat. 62, 67	37
Indian Appropriation Act of July 1, 1898, c. 545, 30 Stat. 571, 576	36
Act of May 22, 1926, c. 364, 44 Stat. 617, as amended by Act of April 18, 1928, c. 379, 45 Stat. 431	3, 30

	Page.
Canadian Statute:	
Indian Act, c. 98, R.S.Can., 1927, Secs. 50, 51	8
Treaties:	
Webster-Ashburton Treaty of August 9, 1842, 8 Stat. 572, 574, Art. II	37
Treaty of January 11, 1909, between the United States and Great Britain, 36 Stat. (Pt. 2) 2448, 2451	3, 17, 28
Treaty of February 24, 1925, between United States and Great Britain, 44 Stat. (Pt. 3) 2108:	
Art. II	21–22
Art. IV	22
Art. IX	29
Art. X	32
Miscellaneous:	
76 Cong. Rec., pp. 4535–4536	33
77 Cong. Rec., pp. 173, 1008	33
78 Cong. Rec., p. 21	33
House Doc. No. 774, 71st Cong., 3d Sess	33
Malloy, *Treaties*, Vol. 1, p. 652, 653	8

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 580

ELIAS A. OLSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 581

RANDOR G. KARLSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 582

HARRY BREWSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The charge to the jury appears at R. 126. The opinion of the Circuit Court of Appeals appears

at R. 417–429. The dissenting opinion is at R. 429–439. The opinions are reported in 67 F. (2d) 24.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered August 21, 1933. (R. 439–440.) The petition for writs of certiorari was filed November 10, 1933, and granted December 11, 1933, pursuant to the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question presented may be best expressed in the language of the Circuit Court of Appeals (R. 419):

> But one main issue is involved in these appeals. It is raised in the record in various ways—by exclusion of evidence, refusal to charge and the charge to the jury. The issue is whether the use of these properties for flowage purposes is such a use as, *under the circumstances here,* can be considered as an element of that value for which compensation must be made. (Italics ours.)

The "circumstances here" are set out in the statement. The question presented is whether, in their light, the past flooding of the lands in question, and their admitted physical availability for storing water, are elements of value in a condemnation case.

TREATIES AND STATUTES INVOLVED

Treaty of 1925 between the United States and Great Britain in respect of Canada, 44 Stat. (Pt. 3) 2108;

Treaty of 1909 between the United States and Great Britain relating to boundary waters between the United States and Canada, 36 Stat. (Pt. 2) 2448;

Act of May 22, 1926, c. 364, 44 Stat. 617, as amended by the Act of April 18, 1928, c. 379, 45 Stat. 431.

Pertinent parts of these treaties and statutes as amended are set forth in the appendix to petitioners' brief.

Webster-Ashburton Treaty of 1842, 8 Stat. 572;

Act of June 7, 1897, c. 3, 30 Stat. 62, 67;

Act of July 1, 1898, c. 545, 30 Stat. 571, 576.

Pertinent parts of these statutes and treaty are set forth in the appendix hereto.

STATEMENT

This is a condemnation proceeding instituted by the United States (R. 2) under the provisions of the Lake of the Woods Act (Act of May 22, 1926, c. 364, 44 Stat. 617) as amended by the Act of April 18, 1928, c. 379, 45 Stat. 431. The estate condemned is an easement of flowage up to elevation 1064, sea-level datum, upon lands bordering the Lake of the Woods, in Minnesota (R. 7–11). The Lake of the Woods is a large body of water, partly in Canada and partly in Minnesota. The surface area of the lake is 1485 square miles, with its main inlet by the Rainy River, along the international

border from the east, and its outlet to the north, in Canada, by the Winnipeg River. (Atlas, Ex. 24; Final Report of the International Joint Commission, Ex. 71, p. 14.) The rainfall in the watershed is heavy, and the rivers large. (Same, p. 112.)

In 1898 the Keewatin Power Company (a Canadian corporation), by agreement with the Crown, placed in operation a control dam (the Norman Dam) in Canada, near Kenora (R. 237), which caused an average rise in the lake level of about three feet, with resulting invasion of shore lands. The flooding of the shore lands has intermittently continued since 1898 and is substantially the level to be maintained hereafter. (R. 22–23; Final Report of the International Joint Commission, Ex. 71, pp. 16–18, 28–30, 53–54.) The easements involved here are over the shore lands so affected.

In 1909 a treaty was entered into between the United States and Great Britain with respect to Canada "relating to boundary waters" which created the International Joint Commission, with jurisdiction over such waters. (36 Stat. (Pt. 2) 2448, 2451.) Shortly thereafter the Lake of the Woods situation was referred to the Commission. After extensive studies, the final report of the Commission was submitted to the two governments in 1917. (Final Report of the International Joint Commission, Ex. 71.) As a result, in 1925 a treaty was entered into between the United States and Great Britain in respect of Canada "to regulate the level of the Lake of the Woods" and putting into

effect the recommendations of the International Joint Commission, permitting the acquisition of a flowage easement on the Minnesota shore lands. (44 Stat. (Pt. 3) 2108.)

To carry into effect this treaty the Act of May 22, 1926 (c. 364, 44 Stat. 617), as amended by the Act of April 18, 1928 (c. 379, 45 Stat. 431), was passed, in which the Secretary of War was required to acquire, by purchase or condemnation, "flowage easements up to elevation 1064 sea-level datum upon all lands in such State [Minnesota] bordering on the Lake of the Woods, Warroad River, and Rainy River, * * *."

Being unable to secure these flowage rights on various tracts by purchase, the present condemnation proceeding was instituted.

Commissioners appointed by the District Court for Minnesota in the condemnation proceedings made awards (R. 13), from which the United States and the present petitioners appealed to the District Court. The cases were consolidated for trial (R. 21) for the purpose of tendering an issue of law as to the admissibility of evidence of the contribution of Lake of the Woods to the development of hydro-electrical power on the Winnipeg River and the advantage to such development that might be derived from the storage of water on the shores of the lake. This testimony was proffered (R. 162) upon the theory that compensation should be made on the basis of "reservoir values" of the shore lands.

When this testimony was presented, the United States objected (R. 25) and was permitted (R. 136) to offer evidence as a foundation for its objection. This evidence showed, among other things, the following:

The mainland shore line of the Lake of the Woods (including the lower reaches of the Rainy River affected by the flowage) is (R. 138, 224, two estimates):

	Miles
In the United States	155 or 115
In Canada	1280 or 922
Total mainland	1435 or 1037

There are a number of large islands (1 mile or over in diameter) and approximately 10,000 small ones. The shore line of the islands is (R. 138, 224, two estimates):

	Miles
In the United States	33 or 25
In Canada	1625 or 1163
Total for islands	1658 or 1188

The total shore line (mainland and islands) is therefore:

	Miles
In the United States	188 or 140
In Canada	2905 or 2085
Total	3093 or 2225

The American shore line and islands are all in Minnesota. Of the Canadian shore line 35 miles of mainland are in Manitoba. The balance, and all the Canadian islands, are in Ontario. (R. 224.)

A considerable part of this long shore line was in private ownership. On the American side there

were 850 to 860 separate tracts, owned by 775 to 890 separate individuals, and subject to mortgages, etc., held by from 1200 to 1400 more. (R. 137–138.) The two lists contained some of the same names, but the District Engineer of the War Department had been able to record the interests of 1227 different persons. These persons were geographically distributed as follows (R. 139):

Near the lands	496
Elsewhere in Minnesota	186
In the United States outside Minnesota	102
In Canada	21
Deceased	21
Addresses unknown	401

The efforts of the War Department to acquire the flowage rights by purchase were successful in 7 cases. (R. 139.)

There were also, on the American side, considerable areas owned by the United States, some lands owned by the State of Minnesota, subject to contract for sale to private persons, and some held by private persons under homestead entries only. The location of these is shown on the map, Ex. 3. (R. 163.)

On the Canadian side, in Ontario, 723 leases or patents had been issued. Thirty-two of these were in Kenora and Keewatin (villages on the north shore of the lake), and had subsequently been subdivided into town lots and smaller parcels. (R. 225–226.) In Manitoba no patents had been issued. (R. 227.) The remaining Crown lands in Ontario (between elevations 1059 and 1064) aggregated 13,043 acres, and in Manitoba 14,427 acres.

(Final Report of the International Joint Commission—Ex. 71, p. 61.) The Crown lands along the lake in Manitoba were withdrawn from entry in 1915 (Ex. 66, R. 248–250), and in Ontario in 1920 (Ex. 66, R. 251–253), so as not to interfere with contemplated regulation of the level of the lake.

There were also, on the lake shore in Canada, some 40 Indian Reserves, with a total foreshore length of some 250 miles (Map Ex. 69, R. 263) and an area (below contour 1064) of 9813 acres. (Final Report of International Joint Commission, Ex. 71, p. 61.) Under the governing Canadian statute no part of an Indian Reserve could be disposed of "unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of 21 years, at a meeting or council thereof summoned for that purpose, according to the rules of the band" and unless, further, the release was approved by the Superintendent General. (Indian Act, R.S.Can., 1927, c. 98, Secs. 50, 51.)

Lake of the Woods itself is a public navigable water, one of those "water communications" which by Article II of the Webster-Ashburton Treaty of 1842[1] "shall be free and open to the use of the citizens and subjects of both countries." This free and open use, its protection and improvement, has been the concern of both the governments. We have already referred to the two later treaties on the sub-

[1] 8 Stat. 574; Malloy, *Treaties*, Vol. 1, p. 652, 653; see *Pigeon River Improvement Co. v. Cox*, Jan. 15, 1934, No. 126, present term.

ject. The interests of the United States throughout have been in navigation, and in the protection of its homesteaders upon the shore. (Final Report of the International Commission, Ex. 71, pp. 18–23.)

The actual level of the lake, however, depends on control measures at the outlets, and those outlets are in Canada. A succession of dams have existed at the outlets since 1887 (R. 157–159), and since 1898 those dams and the flow through them have continuously been controlled by the Governments of Ontario and the Dominion (R. 237–244). In 1925, under the present treaty, an international regime was added. The history of all this regulation is set out in the brief filed in this cause on behalf of the Government of Canada and will not be repeated. The evidence showed clearly that the outlets had been regulated by government authority since 1898, and that the purpose of the regulation was and is not water power primarily or chiefly, but the protection so far as possible of all the interests concerned—that is, navigation, domestic and sanitary uses of the water, fishing, lumbering and logging, lake shore resort and residence, water power, and irrigation. (Final Report of the International Joint Commission, Ex. 71, pp. 16–25, 41–52.) These interests conflict, and control by government could never be, and has not been, primarily or chiefly in the interests of power.

Upon this evidence the District Court concluded that the chance of any one acquiring, in one

interest, the right to flood the lake shore and control the outlets, in the interest of power, was nil. Therefore, he consistently excluded testimony tending to show value on that basis. Such testimony was offered in very many forms, but it was conceded on the trial that the many items offered "do not bear upon the question of any other value except the value of the flowage easements and the reservoir value of the property." (R. 162.) The District Court excluded all of it, and further charged the jury to exclude any claim for reservoir value. (R. 130.) Whether this was right is the only question in the case.

The judgment of the District Court was affirmed by the Circuit Court of Appeals, one judge dissenting. (R. 416–439.) The case is here on certiorari to that court.

SUMMARY OF ARGUMENT

I. The Government does not deny that an owner is entitled, in a condemnation case, to the market value of his land, including in that value any element of "special availability" for special uses which in fact exists in such form as really to influence the market value. But on the facts proved in this case the chance that any one ever could acquire the right to flood all of the lake shore of the lake, and also to control its levels, in the interests of water power, was nonexistent. For that reason it was proper to reject all evidence of special

value for that purpose, and to exclude it from the jury.

II. The actual flooding of the lands in question, in past years, shows merely that they could be flooded by control works in the outlets of the lake. That has never been disputed, but it does not show or tend to show that they had market value as a portion of a reservoir for power. Such value necessarily depended, not only on the physical possibility of such use, but also on the possibility in other respects of anyone acquiring the right to avail themselves of it in practice. Failing the latter possibility, the lands had no market value as a storage reservoir.

III. The true rule of damages is that applied below—namely, the difference between the market value of the lands before and after the taking—and not, as claimed by the petitioners, a separate "unit" of value for reservoir or flowage use. But even if the petitioners were right in this regard, the result would be the same, for the same facts that show "reservoir value" nonexistent as an element of general market value also show it nonexistent as a separate "unit."

IV. The offers to prove actual increased sales values of similar lands on account of water-power possibilities clearly referred to speculation based on the probability of Government taking, and were therefore properly excluded.

V. Whether the petitioners had, prior to the Treaty of 1925, a right to recover damages from the Canadian authorities for the flooding of their lands in Minnesota, is immaterial. If such a right had existed, and if the obligation had in fact been assumed by the United States, still the right and obligation had nothing whatever to do with the market value of the lands at the time of taking, which was the only question in this case.

VI. The decision below is not in conflict either with the Treaty of 1909 or that of 1925 or with the Act of May 22, 1926, but is in strict accord with all three.

VII. The decision below is also in accord with the local law of Minnesota.

ARGUMENT

I

"RESERVOIR VALUE" WAS NONEXISTENT IN FACT AND WAS THEREFORE PROPERLY EXCLUDED

The Government does not deny that an owner is entitled in a condemnation case to the market value of his land, including in that value any element of "special availability" for special uses which in fact exists in such form as really to influence the market value. This was settled a long time ago in *Mississippi Boom Company* v. *Patterson,* 98 U.S. 403, and has been held in many cases since. The question is, however, in each case not only whether such "special availability" physically exists in fact but

whether it exists in such form as to make it reasonably probable that any person could make use of it. If the facts show that the availability, although physically present, is not present in such form that it is possible for any one to acquire the right to use it, then it cannot in the nature of the thing create a market value. This proposition has frequently been decided and is made clear in particular by two decisions of this Court.

McGovern v. *New York*, 229 U.S. 363, dealt with a condemnation in the New York courts for a reservoir for use by the City of New York. The "reservoir value" had been excluded by the New York court, and the question here was whether such exclusion was a denial of due process. This Court held that it was not, and on the present question the Court said (p. 372):

> There are said to have been hundreds of titles to different parcels of that land. If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect upon the valuation. See *Chicago, Burlington & Quincy R.R. Co.* v. *Chicago*, 166 U.S. 226, 249. The plaintiff in error was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless

that possibility was considerable enough to be a practical consideration and actually to influence prices. *Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195. In estimating that probability the power of effecting the change by eminent domain must be left out. The principle is illustrated in an extreme form by the disallowance of the strategic value for improvements of the island in St. Mary's River in *United States* v. *Chandler-Dunbar Water Power Co.*, *ante*, p. 53.

City of New York v. *Sage*, 239 U.S. 57, was a similar condemnation which had been removed into the United States court and was tried there. The courts below had permitted an allowance for "reservoir value." This Court held that this was error, and said (p. 61):

> The decisions appear to us to have made the principles plain. No doubt when this class of questions first arose it was said in a general way that adaptability to the purposes for which the land could be used most profitably was to be considered; and that is true. But it is to be considered only so far as the public would have considered it if the land had been offered for sale in the absence of the City's exercise of the power of eminent domain. The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price.

> But what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots. The City is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain. Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give.

In the present case the facts are much stronger than they were in either of those cited. Not only is the project vastly larger, and the separate ownerships and titles more numerous, but there are involved five sovereignties—the United States, Canada, the State of Minnesota, and the Provinces of Ontario and Manitoba—instead of one. Much of the land belonged to government and a large part of it had been withdrawn from private entry for the purpose of permitting government regulation of the water level. Two hundred and fifty miles of shore line were held by forty Indian tribes and could not be surrendered except by the consent of a majority of the adult male members of the tribe in

each case and by permission of the appropriate Canadian Indian authority.

In the cases from New York there was no controversy over the uses of the water. It was entirely appropriate to use it for a domestic water supply and no other interest required its use. In this case not only were there other interests besides the power interest, but the desires and requirements of those other interests necessarily conflicted with the use of the water for water-power purposes. The most effective use for water power required the maximum storage of water in wet seasons and the maximum withdrawal in dry seasons, that is to say, necessarily the maximum fluctuation in the level of the water of the lake. Use for navigation, fishing, logging, summer cottages, resorts, or domestic sewerage, on the other hand, required a reasonably steady level of the lake, that is, a wasting of flood waters and a holding back of water in dry season. The Final Report of the International Joint Commission, Ex. 71, pp. 41 to 52, is most instructive on this question. The Governments of Canada and the United States had been committed ever since 1842 (Webster-Ashburton Treaty of 1842, 8 Stat. 572, Art. II) to the proposition that the lake "shall be free and open to the use of the citizens and subjects of both countries." Such free and open use for navigation, fishing, and rafting logs would be seriously interfered with by any regulation of the levels of the lake which had the development of water power as its principal objective. In addition,

by the Treaty of January 11, 1909, between the United States and Great Britain, relating to boundary waters (36 Stat. Pt. 2, p. 2448, 2451) it is agreed in Article 8 as follows:

> The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:
>
> (1) Uses for domestic and sanitary purposes;
>
> (2) Uses for navigation, including the service of canals for the purposes of navigation;
>
> (3) Uses for power and for irrigation purposes.

It was quite inconceivable that any private interest should ever have the right to regulate the waters of the lake in the interest of water power.

Under the cases, therefore, it is clear that the development of the Lake of the Woods as a water-power reservoir in any private interest was not at any time a possibility, and the lands along its shore had no market value for that purpose.

II

THE ACTUAL FLOODING OF THE LANDS IN THE PAST DOES NOT SHOW OR TEND TO SHOW THAT THEY HAD A "RESERVOIR VALUE"

The lands in question have been flooded intermittently since 1898 as a result of control works

constructed at the outlets of the lake, near Kenora in the Province of Ontario, prior to that time, and put into operation in that year under the authority and control of the Government of Ontario. (R. 157–159, 237–244; Final Report of the International Joint Commission, Ex. 71, pp. 28, 53–57.)

It was for a long time thought, both by the Ontario authorities and by the United States War Department engineers that the high-water in the lake at various times after 1898 resulted from natural causes and that the only effect of the control works was to save water at low stages and raise the level at low-water. (Final Report of the International Joint Commission, Ex. 71, pp. 16 to 25, 53 to 56.) It was, however, found by the International Joint Commission that the effect of control works had in fact been to raise the average level of the lake in the years from 1892 to 1916, 3 feet above what it would have been if the outlets had remained as in a state of nature. (Final Report of the International Joint Commission, Ex. 71, p. 28.) It also appeared to the Commission that the extreme high-water which occurred in certain of those years, with considerable damage to property along the lake, was in part the result of the control works, and could and should in the future be prevented by the creation of new artificial outlets as a part of the proposed international control. (Final Report of the International Joint Commission, Ex. 71, pp. 28 to 30, 32 to 33, 63.)

It must, therefore, now be taken as established that lands on the shore of the lake were in fact flooded on occasions between 1898 and 1925, as a result in part of the control works at the outlets of the lake. The question is, however, whether this established fact shows or tends to show that the shore lands had any market value as a storage place for water. The flooding shows what is admitted, that water could be stored upon these lands. In other words, as nature built this lake its level can be raised by dams and the flood waters of wet seasons held for use in dry. The physical possibility of such use is all that is established by the flooding, and it has never been disputed.

To create the basis of the market value, it must appear not only that it is physically a possibility to use land for a certain purpose, but also equally that such use is otherwise reasonably possible as a commercial proposition. No one will pay money for a place to store flood waters unless, first, he has a reasonable chance to get all of the land needed to create his reservoir and, second, he has a reasonable chance to be able to control the level and make use of the water and the reservoir when once it has been created. The physical possibility of creating a reservoir is, of course, necessary to any market value for that purpose, but the other possibility is equally essential.

All that the flooding shows in this case is that the physical possibility was present. The other possibility was not and could not be, for the reason

set out under the first point. The flooding of itself, therefore, did not create or indicate a market value.

It is not correct to say, as the petitioners in substance do, that their lands in fact have been used since 1898 as a storage reservoir, for power purposes, or that they are going to be used for that purpose in the future under the international regime. The Final Report of the International Joint Commission (Ex. 71, pp. 16 to 25, 54) and the careful brief of counsel for the Government of Canada in this case show clearly that the regulation by Ontario and the Dominion Government have been intended, at least, merely to maintain a normal summer level in the interest of navigation. It now appears that the effect of those controls has been in part to flood the lands of the petitioners, but that is not the same as saying that the lands of the petitioners have been made use of to store water for power purposes.

Further, under the international regime control is not to be primarily or chiefly in the interest of power, but rather in the interest of all the persons in both countries who desire to use the lake and the water flowing out for many purposes. We have already referred to the conflict of desires between the owners of the water-power and the users of the lake for other purposes. The International Joint Commission saw the conflict clearly and it did not surrender to the water-power interests. The regulation which it recommended and which is made the basis of the Treaty of 1925 (by express refer-

ence in the preamble of the treaty) was aimed at maintaining a reasonably steady level in the waters of the lake, preventing on the one hand extreme flooding by the creation of new artificial spillways for flood water, and permitting a draft on the waters stored in the lake in excess of two or three feet "during periods of exceptional drought occurring about once in 20 years, for the purpose of maintaining a satisfactory outflow." (Final Report, Ex. 71, p. 26.) The report makes it quite clear that while the requirements of the water-powers in the Winnipeg River below the lake for a reasonably constant flow were considered important by the Commission, it considered more important a reasonably steady level in the lake, and the regulation which it recommended and which is established by the treaty was intended for both objects. (Final Report of the International Joint Commission, Ex. 71: Conclusions and Recommendations, pp. 26 to 31; Discussion, pp. 41 to 69.) The treaty itself says (Lake of the Woods Convention, July 17, 1925, 44 Stat. Part 3, p. 2108, 2109), Article II—

> The level of Lake of the Woods shall be regulated to the extent and in the manner provided for in the present Convention, with the object of securing to the inhabitants of the United States and Canada the most advantageous use of the waters thereof and of the waters flowing into and from the lake on each side of the boundary between the two countries for domestic and sanitary pur-

poses, for navigation purposes, for fishing purposes, and for power, irrigation and reclamation purposes.

Article IV—

The level of Lake of the Woods shall ordinarily be maintained between elevations 1056 and 1061.25 sea level datum, and between these two elevations the regulation shall be such as to ensure the highest continuous uniform discharge of water from the lake.

During periods of excessive precipitation the total discharge of water from the lake shall, upon the level reaching elevation 1061 sea level datum, be so regulated as to ensure that the extreme high level of the lake shall at no time exceed elevation 1062.5 sea level datum.

The level of the lake shall at no time be reduced below elevation 1056 sea level datum except during periods of low precipitation and then only upon the approval of the International Lake of the Woods Control Board and subject to such conditions and limitations as may be necessary to protect the use of the waters of the lake for domestic, sanitary, navigation and fishing purposes.

In other words, the regulation of these waters from 1898 to date by Canadian authorities and through the international regime have been and are, not in the interest of the development of water-power, but to protect, so far as possible, all the interests concerned.

This does not lessen the flooding of the lands in question. It does not decrease the actual damages of the petitioners or their right to be recompensed for those damages. It does show that the flooding of the petitioner's lands has not been primarily for water-power, that they have not in fact been made use of for that purpose, and that they never had and have not now any market value for that use.

It was contended by the petitioners below, and is contended here, that the court erred in applying to this case the "orthodox" rule of damages, that is, the difference between the value of the land before the taking and its value afterward, and that the court should rather have directed the jury to assess a separate value for the flowage easement taken as a separate unit of property.

The rule of damages actually adopted by the trial court is set out in its charge. (R. 129–130.) That this method was correct and that the other method would be incorrect is demonstrated in the opinion of the Circuit Court of Appeals. (R. 420–423.) (Judge Booth did not express dissent from the view of the majority upon this point.) It is not possible to add to what the court below has already said upon this question, but even if both the courts below were mistaken as to the proper rule of damages the result would be the same. The inquiry is, admittedly, as to market value, whether that be market value of the land as a whole before and after the taking, or market value of the separate

element of availability of reservoir use. Whichever way the subject is approached the same facts are true. The facts which show that there can be no addition to the general market value of the land on account of use or availability for storing water show equally that there can be no market value of the flowage easement considered as a separate unit. Whichever view is taken as to the rule of damages the facts show that there could be no market value for the flowage rights.

Proof was offered at the trial in connection with sales of certain lands similarly situated that the prices paid were somewhat higher than they might otherwise have been on account of the availability of the land for water-storage purposes. (R. 57–72, 91–94, 97, 99–100.) The Government did not object to proof of actual prices paid (R. 95) but did object to the asserted reason, and its objections were sustained. Substantially all the offers of proof related to "lands below 1064," that is, below the line of flowage fixed by the Commission. (R. 59, 64, 67, 68, 71, 90, 91, 99, 100.)

These negotiations and transactions were before 1925, the year of the present treaty, but they were after 1912, the year in which the subject of regulating the level of the Lake of the Woods was referred by the two governments to the International Joint Commission. (Letter of reference, Final Report of the International Joint Commission, Exhibit 71, p. 3.) The Commission did not

report upon the reference until 1917. During the intervening five years the Commission had had a considerable number of public hearings in the territory to be affected by the regulation, and the subject of regulating the levels of the lake by action of the two governments combined was a very active one in the territory concerned and was known to the witnesses. (R. 65–66, 90–91.) It is not surprising that with the taking by two governments officially impending speculative offers for land affected by the taking should have been made. It is, however, quite clear that such transactions and negotiations caused by the likelihood of the very taking which subsequently occurred are not evidence of value in that taking. It is only the "rise in value before the taking not caused by the expectation of that event" which is to be considered. *New York* v. *Sage*, 239 U.S. 57, 61; *Kerr* v. *South Park Commissioners*, 117 U.S. 379, 385–387; *Shoemaker* v. *United States*, 147 U.S. 282, 305; *McGovern* v. *New York*, 229 U.S. 363, 372.

In the circumstances of these lands no one in his senses could have thought that they were available for use as a water-storage reservoir without the joint action of the two governments then under consideration. Any enhanced value in those years based on consideration of their use for storing water necessarily depended on the probability that the reference then before the Joint Commission would result in a governmental taking. An increase of value induced only by that thought is not allowable.

It might be thought that the objection to the proof just mentioned, and to all proof of reservoir availability and value, went more to its weight than to its admissibility, and that, therefore, it would have been more proper for the District Court to hear the evidence, and to deal with the question in the charge. In the normal case this might be so. But the District Court has some discretion in the conduct of the trial, and when, as here, the facts that make market value for a certain purpose nonexistent are proved in detail, and are as overwhelming as they were upon this trial, it is entirely proper for the court to exclude the evidence entirely. *McGovern* v. *New York*, 229 U.S. 363, 369–370, 371, 373; *Kerr* v. *South Park Commissioner*, 117 U.S. 379, 384–387; *Sargent* v. *Merrimac*, 196 Mass. 171.

III

RIGHTS OF ACTION FOR PRIOR FLOODING

Judge Booth's dissent below goes mainly on the proposition that petitioners had valid claims against Canadian authorities for the flooding of their lands prior to the Treaty of 1925; that those claims somehow inhered in the lands as an element of value and should be paid for in these proceedings. With all possible respect for this very able dissenting opinion, it appears to the Government that it is mistaken in several respects. The questions are, first, whether any such rights ever existed against Canada or any Canadian interests; second, whether if they did, they have been as-

sumed by the United States (the only party to this litigation other than the landowners); and third, whether if such claims exist and are enforceable against the United States they have anything to do with the value of the lands in controversy.

The original control of the levels of the lake by the dams placed in the outlets at Kenora was apparently by private interests which, however, from 1898 to date were controlled and regulated constantly by the Governments of Ontario and the Dominion. (R. 237–244.) Whether owners of shore lands on the lake flooded by the operation of these dams had any claim assertable in court against the Canadian authorities is primarily a question of the law of Canada. It is treated fully in the brief filed by counsel for the Government of Canada in this case, and we will not repeat the argument. It should, however, be noted on the American side, first, that the control works were in place and operating before petitioners acquired their lands (R. 94, 99, 169) and while the lands were still public lands of the United States; and, second, that the petitioner's lands were all acquired "subject to the right of the United States to construct and maintain dams for the purpose of creating reservoirs in aid of navigation, and no claim or right of compensation shall accrue from the overflowing of said lands on account of the construction and maintenance of such dams or reservoirs." Indian Appropriation Act July 1, 1898, 30 Stat. 571, 576; Indian Appropriation Act June 7, 1897,

30 Stat. 62, 67; Chippewa Lands Act, January 14, 1889, 25 Stat. 642.

The Canadian dams were not within this reservation because they were not constructed nor maintained by the United States, but the unrestricted right of the United States to flood these lands for navigation might well have a bearing on any claims made by their owners for like flowing by Canadian authority. The Boundary Waters Treaty of 1909 gave certain rights to private parties injured by "any interference with or diversion from their natural channel of such waters on either side of the boundary," but the treaty was careful to set forth that "this provision shall not apply to cases already existing." (Treaty of 1909 between the United States and Great Britain relative to boundary waters, 36 Stat., Pt. 2, p. 2448, Article II.) It seems quite clear that "cases already existing" in this treaty meant cases of "interference with or diversion from their natural channel of such waters on either side of the boundary," referred to in the same article; that is, it meant, among other things, the dams that had existed at Kenora since 1898. The purpose of the parties to the treaty clearly was to create rights in their nationals against each other on account of diversions and obstructions in the future, but not on account of diversions and obstructions then existing.

Assuming, however, that some rights against Canadian authorities existed in the owners of the flooded shore lands prior to 1925, were

the obligations assumed by the United States? Article IX of the Treaty of 1925 (Treaty between the United States and Great Britain in respect of Canada to regulate the level of the Lake of the Woods, February 24, 1925, 44 Stat., Pt. 3, p. 2108) provides in the first paragraph:

> The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.

By this paragraph the United States agreed as between itself and Canada to be responsible for claims for prior damages to lands upon its side. The treaty does not say and does not mean that private persons shall be authorized to sue the governments for the past flooding, and no court of the United States would have power to entertain a suit against the United States for damages for trespass resulting from an obstruction of waterways in Canada. All that the treaty says and all it means is that each country will deal with the damage claims of its own nationals.

The obligation of the United States to deal with these claims on its side of the boundary was no doubt a legal obligation so far as Canada was concerned (that is to say, if a judgment against Canada had been recovered in a Canadian court by an

American landowner for the trespass, the United States would have been obliged to pay it), but with respect to the claims of owners of land in the United States the obligation of the Government to satisfy their claims was moral only.

Accordingly, in the Act to carry into effect the provisions of this treaty, Congress provided two proceedings (Act of May 22, 1926, c. 364, 44 Stat., Pt. 2, p. 617, amended by Act of April 18, 1928, c. 379, 45 Stat. 431, 432). Section 1 provides for condemnation of the flowage easement. Section 3 provides as follows:

> The Secretary of War is hereby authorized and directed to cause to be investigated, as soon as practicable, all claims for damages caused, prior to the acquisition of flowage easements under this Act, to the inhabitants of the United States by fluctuation of the water levels of the Lake of the Woods due to artificial obstructions in outlets of said lake, and after due notice and opportunity for hearing, shall ascertain and determine the loss or injury, if any, that may have been sustained by the respective claimants and to report to Congress for its consideration the amount or amounts he may find to be equitably due such claimants, together with a statement in each case of the substantial facts upon which the conclusion is based.

In other words, the Congress dealt correctly and exactly with the legal situation as it found it. It

authorized these condemnation suits in which the damage to the property caused by the present taking should be ascertained and paid, and it authorized an investigation of the prior flooding in which the amount "equitably due" to every claimant should be reported to the Congress for its action. The damage claims have never been, and are not now, a legal obligation of the Government of the United States.

Assuming, however, that they were, they have no bearing on this litigation. The only question in the courts below was the damage to the lands in question by the present taking of the flowage easement. The only question here is whether in the circumstances evidence of market value for a storage reservoir was properly excluded. Neither of these questions is affected in the least by the solution of the further question whether the same owners have valid claims for damages for former flooding of their lands.

IV

THE DECISION BELOW DOES NOT CONFLICT EITHER WITH THE TREATY OR THE ACT

Very little remains to be said upon this point.

The only question in the courts below was the measure and amount of compensation payable to the petitioners upon the taking. Neither the Treaty nor the Act lays down any rule upon this

subject. They leave it, necessarily and with entire propriety, to the courts to settle in the condemnation case. It was, therefore, open to the courts below, and it is open to this Court, to state and to apply the true legal rule of damages, without embarrassment by any suggestion either of limitation or enlargement contained either in the Treaty or the Act.

It is, however, reasonably clear that neither the treaty making power nor Congress considered that the owners of the shore lands were entitled to anything except payment for the actual damage to their lands, and neither thought the value of the reservoir should be divided up among them.

The Final Report of the International Joint Commission (Ex. 71) contains careful estimates of cost, including estimates of value of the flooded lands. (Pages 30–31, 59–61, 163–166.) The Commission wished "to emphasize the fact that no part of its investigation has been carried out with greater care than that involving the determination of the value of these various classes of lands adjoining the Lake of the Woods." (Page 60.) The Commission's findings as to damages and values contain no allowance for "reservoir value" or the like. A comparison between the total values found by the Commission ($245,000: Report, p. 39) and the amount of Canada's initial contribution to the cost of securing flowage rights ($275,000: Treaty

of 1925, Article X) shows that in this, as in other respects, the treaty making power relied upon the Commission's work.

The report of the Secretary of War under Section 3 of the Act of 1926, *supra*, has also been submitted to and considered by the Congress. Here also the discussion shows that only damage actually suffered was intended to be paid for, and not theoretical losses based on reservoir availability.[2]

It is not intended to suggest that this understanding by the treaty making power and Congress, is binding on the court, or that it limits the right and power of the court to award to the petitioners the "reservoir value" claimed if they are otherwise entitled to it. But it does show that the action of the court below is in accordance with the purpose both of Congress and the treaty making power.

V

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE LOCAL LAW OF MINNESOTA

The effect of multiplicity of titles on values dependent on unification has never been considered by the Supreme Court of Minnesota. But in the

[2] Letter from the Secretary of War transmitting the report; Damage Claims Lake of the Woods; House Doc. 774, 71st Congress, 3d Sess.; Debate on Sen. Joint Res. 124 and House Joint Res. 64, Cong. Record, 72d Cong., 2d Sess., Vol. 76, pages 4535–6; 73d Cong., Vol. 77, pp. 173, 1008; 73d Cong., 2d Sess., Vol. 78, p. 21.

very case cited by petitioners, *Conan* v. *City of Ely,* 91 Minn. 127, 131, the landowner was held (in the passage quoted by the petitioner) "entitled to the value of his property for any use * * * *for which it would ordinarily sell in the market.*" (Italics ours.)

If, as found by the lower courts, union of the required tracts did not have "that degree of probability or possibility which could affect the value of these lands and be an influence or consideration affecting, in the slightest degree, the minds of sellers and buyers thereof in arriving at a fair price therefor" (R. 428), it is plain that the *Conan* case would not require Minnesota courts to treat the use here alleged as a use "for which it (the property) would ordinarily sell in the market." It is unnecessary to discuss *Adams* v. *C. B. & N. R. Co.,* 39 Minn. 286, and *Minneapolis, St. Paul R. & D. Elec. T. Co.* v. *Searls,* 208 Fed. 122. They simply hold that an easement is property, and apparently petitioners' objective is to have the flowage easement valued as the "unit" of property taken. This claim has already been discussed. There is no conflict between the instant decision and the local law of Minnesota.

CONCLUSION

It is, therefore, clear in every view that the lands of the petitioners had no market value for a reservoir, and that none should be allowed.

It is respectfully submitted that the decision of the Circuit Court of Appeals was right, and its judgment should be affirmed.

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Assistant Attorney General.
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Special Assistants to the Attorney General.

MARCH 1934.

APPENDIX

Indian Appropriation Act, approved July 1, 1898, c. 545, 30 Stat. 571, 576, provides:

> For completing the necessary surveys within the Chippewa Indian Reservation in Minnesota, including expenses of examining and appraising pine lands, under the provisions of the Act approved January fourteenth, eighteen hundred and eighty-nine, to be reimbursed to the United States out of proceeds of the sale of their lands, fifty thousand dollars: *Provided,* That all lands *heretofore or hereafter* acquired and sold by the United States under the "Act for the relief and civilization of the Chippewa Indians in the State of Minnesota", approved January fourteenth, eighteen hundred and eighty-nine, shall be subject to the right of the United States to construct and maintain dams for the purpose of creating reservoirs in aid of navigation, and no claim or right of compensation shall accrue from the overflowing of said lands on account of the construction and maintenance of such dams or reservoirs. And the Secretary of War shall furnish the Commissioner of the General Land Office a list of such lands, with the particular tracts appropriately described, and in the disposal of each and every one of said tracts, whether by sale, by allotment in severalty to individual Indians, or otherwise, under said Act, the provisions of this paragraph shall enter into and form a part of the contract of purchase or transfer of title. (Italics ours.)

This legislation is identical with another Indian appropriation Act approved June 7, 1897 (c. 3, 30 Stat. 62, 67) except for the addition in the 1898 Act of the three words italicized above.

Webster-Ashburton Treaty of 1842, 8 Stat. 572, 574, Art. 2:

> It being understood that all the water communications and all the usual portages along the line from Lake Superior to the Lake of the Woods, and also Grand portage, from the shore of Lake Superior to the Pigeon river, as now actually used, shall be free and open to the use of the citizens and subjects of both countries.

U. S. GOVERNMENT PRINTING OFFICE 1934

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No. 580, 581, 582

In the Supreme Court of the United States

October Term, 1933

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vs.

UNITED STATES OF AMERICA

RANDOR G. KARLSON, *Petitioner,*

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Brief of the Government of Canada

(Appearing pursuant to the provisions of the Protocol Accompanying Convention to Regulate the Level of the Lake of the Woods; signed at Washington the 24th February, 1925.)

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INDEX

	Page
Opinions Below	3
Jurisdiction	4
Questions Presented	4
Treaties and Statutes Involved	4
Statement of the Case	5
Argument	15
I. There never was and never could have been any purchaser of easements for reservoir use except the expropriating authority	16
II. The obstacles in the way of reservoir construction by private enterprise made the possibility of a reservoir use of the lands too remote and uncertain to constitute an element of value	22
1. The Principles of Law governing the recognition of special adaptability of lands as an element of damage	22
A. Discussion of the legal principles of special adaptability by the English Courts	23
B. Discussion of the legal principles of special adaptability by the Canadian Courts	27
C. Statement of the legal principles of special adaptability by the United States Courts	31
D. Conclusions	36
2. The specific application to the facts of this case of the Principles of Law above summarized	38
A. The multiplicity of titles made it impracticable to unite the privately owned lands bordering on the lake for reservoir purposes, in any way save by eminent domain	39

PAGE

B. The ownership of a large part of the the shore lands by the Province of Ontario made it impracticable for the land owners, or any persons other than the two Governments acting conjointly, to constitute a storage reservoir..... 41

C. The shorelands were subject to four (five since the transfer of the resources to Manitoba) separate governmental jurisdictions, three of which are in Canada, namely, the Dominion, Ontario and Manitoba..... 43

D. By reason of the withdrawal of Canadian lands from acquisition by private interests, it was legally impossible for any private person to use the Lake of the Woods as a storage reservoir..... 45

E. The legal obstacles to exercise of flowage rights on Indian Lands by private parties made it impossible to acquire such rights, save by eminent domain.. 51

F. The Lake of the Woods is a navigable water and hence subject to Dominion control..... 53

G. The Lake of the Woods outlets have been continuously controlled by the Governments of Ontario and of the Dominion, from 1898 to date..... 55

H. International commitments made independent action by private interests impossible..... 65

I. Impracticability of securing concurrence of all interested parties to level control by any other agency than the Governments pursuant to treaty..... 72

J. Conclusions..... 81

3. The fact of flowage prior to condemnation is irrelevant to a determination of the compensation to which the owners are entitled in this proceeding..... 82

PAGE

4. The landowners, prior to the Lake of the Woods Convention (1925) had no right to redress for flowage and the judgment appealed from, to the extent that it is based on this proposition, is not inconsistent either with that Convention or with the prior Boundary Waters Treaty of 1909. . . 85

A. Whether the landowners had a right to redress for past flooding. 86

B. Whether the ruling of the Circuit Court of Appeals in this matter is inconsistent with the Boundary Waters Treaty 1909. 91

C. Whether the Ruling of the Circuit Court of Appeals in this matter is inconsistent with the Lake of the Woods Convention 1925. 97

III. Answers to various points made in Petitioners' Brief. . . . . 98A.

IV. Conclusion 99

APPENDICES 103

Appendix "A"—Boundary Waters Treaty 1909. . . . 103

Appendix "B"—The Lake of the Woods Convention 1925. 110

Appendix "C"—Protocol accompanying Convention. 117

Appendix "D"—Act of Congress 1926 118

Appendix "E"—Act of Congress 1928. 120

Appendix "F"—Excerpts from the Final Report of the International Joint Commission. 122

Appendix "G"—Note concerning the landowners claim for redress against Canadian agencies in Canada and under the Canadian Law. 126

1. Whether the landowner could obtain compensation and damages in the courts of Canada if the trespass had been committed by private parties. 127

PAGE

2. Whether the landowner could obtain compensation by Petition of Right if the flowage use had been taken by authority of the Canadian Government 128

(*a*) A claim by Petition of Right against the Crown for damages caused to the landowner's land 130

(*b*) A claim against the servant of the Crown for damages caused to the landowner's land 132

(*c*) A claim by Petition of Right against the Crown for compensation upon the theory that the action of the Crown in so regulating the levels amounted to a compulsory taking of a flowage easement .. 133

Note to Appendix "G" setting forth relevant sections of The Public Works Act referred to therein 137

CITATIONS

CASES

Attorney General v. De Keysers Royal Hotel Ltd. L.R. (1920) A.C. 508 ..... 98D

Boston Chamber of Commerce v. Boston, 217 U.S. at p. 194 31

Bowlby v. Woodley, 8 U.C.Q.B. 318 136

Brown v. The King, 12 Ex. C.R. 463 134

Canadian Northern Ry. Co. v. Billings 31 D.L.R., 687 30

Cases cited at 11 L.R.A. (N.S.) 996 23

Cedars Rapids Power Co. v. Lacoste, L.R. (1914) A.C. 569 ..... 23, 27

City and South London Railway v. St. Mary Woolroth, L.R. (1905) A.C. 1 23

Five Tracts of Land v. U.S., 101 Fed. Rep. 661. 36

In *re* Lucas and Chesterfield Gas and Water Board, L.R. (1909) 1 K.B. 16 23

In *re* Snow and the City of Toronto, 56 O.L.R. (Ontario) 100 29

John Stirrett & Sons v. Kaministiquia Power Co. Ltd. (1930) 1 D.L.R. 445 128

Kerr v. Park Commrs., 117 U.S. 379 31

	PAGE
Lacoste v. Cedars Rapids Power Co., (1928) 2 D.L.R. 1	28
McGovern v. New York, 229 U.S. 363, 46 L.R. (N.S.) 391	32
McNichol v. Winnipeg, 12 M.R. (Manitoba) p. 305	30
Miller v. The King, 1927, Ex. C.R. p. 67	133
Mississippi and Rum River Boom Co. v. Patterson 98 U.S. 403	34, 35
Muskoka Mill Co. v. The Queen, 28 Grant 563.	98D, 131, 134
New York v. Sage, 239 U.S. 57	32, 40
Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox Ltd., U.S. Law Week Vol. 1, No. 20, pp. 12-15	95
Rex v. Wilson (1914), 15 Exchequer Court Reports (Canada) p. 283	29
Sargent v. Merrimac, 196 Mass. 171, 81 N.E. 170	32
Secretary of State v. Charlesworth, L.R. (1901) A.C. 373	23
Sisters of Charity v. The King, L.R. (1922), 2 A.C. 315	131
Shoemaker v. U.S. 147 U.S. 282	31
United States v. Chandler-Dunbar Co., 229 U.S. 53	34
U.S. v. Seufert Bros. Co. 78 Fed. Rep. 520	35
Yates v. The King 20 Ex. C.R. 175	133
TEXT BOOKS:	
Cripps, on Compensation, 5th Ed. p. 102	23
XXXIX Harvard Law Review, 428	32
Lewis, on Eminent Domain, 3rd Ed. Para. 706, 707	31
Nichols, on Eminent Domain, 2nd Ed. Vol. 1, at p. 671	31, 32
TREATIES:	
Boundary Waters Treaty of 1909 between U.S. and Canada	4, 11, 18, 55, 65, 66, 70, 71, 72, 81, 85, 91, 92, 93, 94, 96, 103-109

PAGE

The Lake of the Woods Convention of 1925 between U.S. and Canada.....4, 12, 18, 19, 60, 61, 62, 69, 71, 79, 80, 85, 88, 97, 98, 110-116

Protocol accompanying Convention..... 5, 6, 117

STATUTES:

United States

Act of Congress May 22, 1926.....4, 12, 18, 118-119

Act of Congress April 18, 1928.....4, 12, 18, 120-121

Canada

The British North America Act 1867 (Imperial).....44, 53, 57

The Manitoba Act 1870 (Dominion)..... 44

The Dominion Lands Act 1872 (Dominion) R.S.C. 1927 Chap. 113 and 20-21, Geo. V. Chap. 25 as amended..... 44, 46

The Indian Act 1876 (Dominion) R.S.C. 1927 Chap. 98 as amended.....44, 51, 52

The Public Lands Act 1877 (Ontario) R.S.O. 1914 Chap. 28 as amended.... 44, 49

The Navigable Waters Protection Act 1882 (Dominion) R.S.C. 1927 Chap. 140 as amended..... 54

The Public Works Act (Ontario) R.S.O. 1897 Chap. 37.....131, 132, 137, 138, 139

The Expropriation Act (Dominion) R.S.C. 1906 Chap. 143..... 134

An Act Relating to the Establishment of the International Joint Commission (Dominion)..... 67

Lake of Woods Control Board Act 1921 (Dom).....9, 57, 59, 61, 63

Lake of Woods Regulation Act 1921 (Dom.).....9, 10, 57, 58, 59, 61

Lake of Woods Control Board Act 1922 (Ontario).....9, 57, 59, 61, 63

The Lac Seul Conservation Act 1928 (Dom.)..... 59

PAGE

The Manitoba Natural Resources Act 1930 (Dom.) 44
The Exchequer Court Act (Dominion), R.S.C. 1927, Chap. 34 130

ORDERS IN COUNCIL:

The Dominion Order in Council of Jan. 21, 1919. 56
The Ontario Order in Council of Feb. 13, 1919. 56
The Dominion Order in Council of Sept. 21, 1921. 58
The Dominion Order in Council of Mar. 27, 1922 48
The Proclamation of the Governor in Council of June 20, 1928 59
The Dominion Order in Council of June 20, 1928 59
The Ontario Order in Council of June 27, 1928. 60

MISCELLANEOUS:

The Canadian Encyclopedic Digest (Ontario) Vol. 8, page 521, 530 ..... 131, 135
Final Report of International Joint Commission. 7, 8, 11, 19, 40, 56, 61, 68, 69, 73, 74, 75, 76, 77, 78, 79, 89, 90, 120-125

No. 580, 581, 582

In the Supreme Court of the United States

October Term, 1933

ELIAS A. OLSON, *Petitioner*,

vs.

UNITED STATES OF AMERICA

RANDOR G. KARLSON, *Petitioner*,

vs.

UNITED STATES OF AMERICA

HARRY BREWSTER, *Petitioner*,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE GOVERNMENT OF CANADA

(Appearing pursuant to the provisions of the Protocol Accompanying Convention to Regulate the Level of the Lake of the Woods; signed at Washington the 24th February, 1925.)

OPINIONS BELOW

No opinion was rendered by the District Court. The charge to the jury appears at R. page 126. The opinion of the Circuit Court of Appeals appears at R. pages 417 to 429. The dissenting opinion appears at R. pages 429 to 439. The opinions are reported in 67 F. (2d.) 24.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 21, 1933 (R. 439-440). The petition for certiorari was filed November 10, 1933, and granted December 11, 1933, pursuant to the provisions of Section 240 (*a*) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions presented may be best expressed in the language of the Circuit Court of Appeals (R. 419):

> But one main issue is involved in these appeals. It is raised in the record in various ways—by exclusion of evidence, refusal to charge and the charge to the jury. The issue is whether the use of these properties for flowage purposes is such a use as, *under the circumstances here,* can be considered as an element of that value for which compensation must be made. (Italics ours.)

If the evidence was rightly excluded no complaint could be made with reference to the charge. The question presented therefore is essentially this: Was testimony of potential utility of petitioner's tracts of land to water-power development admissible as evidence of its value under the circumstances of this case?

TREATIES AND STATUTES INVOLVED

Convention of 1925 between the United States and Dominion of Canada, 44 Stat. Pt. 3, p. 2108;

Treaty of 1909 between the United States and His Britannic Majesty in respect of the Dominion of Canada, 36 Stat. Pt. 2, p. 2448;

Act of May 22, 1926, c. 364, 44 Stat. 617, as amended by Act of April 18, 1928, c. 379, 45 Stat. 431.

Pertinent parts of the treaties and statutes as amended are set forth in the Appendix.

STATEMENT OF THE CASE

This is an appeal from the judgment of the United States Circuit Court of Appeals, Eighth Circuit, confirming the judgment of the United States District Court for the District of Minnesota, Honourable John B. Sanborn, Judge, in a proceeding brought by the United States to establish, by condemnation, its right to overflow the petitioner's land, in the fulfilment of a treaty concluded at Washington between the United States and Canada, the 24th February, 1925, for the regulation of the level of the Lake of the Woods (Lake of the Woods Convention proclaimed the 17th July, 1925, 44 Stat. (Part III) 2108).

The proceedings in the Circuit Court of Appeals were heard by Stone and Booth, Circuit Judges, and Wyman, District Judge. The opinion of the Court was delivered by Stone, Circuit Judge, the conclusion being that the judgments must be and are affirmed. Booth, Circuit Judge, dissented and filed an opinion to the effect that the judgment should be reversed.

By the second article of the Protocol Accompanying Convention to Regulate the Level of the Lake of the Woods, of even date, both in signature and proclamation, with the Convention (44 Stat. (Part III) 2108), it was provided that the Government of Canada should be given the privilege of representation by counsel in the proceedings for the acquisition of the flowage easements.

The objects of the Convention and Protocol are set forth in Article 2 of the former instrument, which reads as follows:—

> "The level of Lake of the Woods shall be regulated to the extent and in the manner provided for in the present Convention, with the object of securing to the inhabitants of Canada and the United States the most advantageous use of the waters thereof and of the waters flowing into and from the lake on each side of the boundary between

the two countries for domestic and sanitary purposes, for navigation purposes, for fishing purposes, and for power, irrigation and reclamation purposes."

The flowage easements, including those which are the subject matter of these appeals, are being acquired in order to carry out these objects.

Accordingly, the Government of Canada, being jointly interested with the United States in the fulfilment of the objects of the Convention, and availing itself of the privilege accorded by the second article of the Protocol, desires to make certain submissions regarding the issues in this appeal.

The issue as stated in the United States brief, is:—

"Was the testimony of potential utility of petitioner's tract to water-power development admissible as evidence under the circumstances of this case?"

The circumstances include the special Canadian and international aspects of the problem, and it will be submitted that a consideration of these aspects will clearly establish a position in which the alleged utility of petitioner's lands to water-power development could not, in accordance with well established principles of law, be considered in estimating compensation.

In order to appreciate the circumstances of this case, it is necessary to commence with an outline of the historical background out of which the proceedings have arisen.

The Lake of the Woods is a large body of water, partly in the State of Minnesota, and partly in Canada. The surface area of the lake is approximately 1,500 square miles, and its shoreline is approximately 2,225 miles, of which 140 miles are in Minnesota and 2,085 miles are in Canada. The outlets of the lake are in Canada. They drain into the Winnipeg River, which flows in a northwesterly direction. The various economic interests that were dependent upon the lake made some measure of con-

trol desirable, and for about forty-five years, there has been control at the outlets. This commenced with purely national control by Canadian agencies, and, subsequently, control by Canadian agencies in which the United States took an active interest. It culminated in the international regime established by the Convention to Regulate the Level of the Lake of the Woods (44 Stat. (P. III) 2108), whereby the lake levels are regulated, in order to secure to the inhabitants of both countries the most advantageous use of the waters of the lake, for navigation purposes, for fishing purposes, and for power, irrigation, and reclamation purposes.

The first structure, built to exercise a measure of control over the lake levels, was Rollerway Dam which was built in 1887-88 by private interests, with the assistance of the Dominion of Canada, in aid primarily of navigation, and secondarily to maintain a constant head of water for the mills located at the outlets. This dam when first constructed raised the level of the lake about three feet, but a few years later it fell into disrepair and the effect was reduced to an increase in level of one and one-half feet. This condition resulted in a project for the construction of Norman Dam (Final Report of the International Joint Commission, pp. 16-17; Exhibit No. 71; v. R. 278; Appendix F, infra p. 122).

Note—This Report was admitted in evidence, but by reason of its bulk, it was not printed in the Record, and accordingly, for the convenience of the Court, relevant excerpts are set forth in the Appendix. (R. 278.)

Norman Dam was built by the Keewatin Power Company in 1893-95, and, from the name of the company, a misunderstanding has arisen. It has been assumed that Norman Dam was operated and maintained for power purposes. This assumption is not justified by the record or by the facts. Norman Dam was built by the company,

but was never used by the company as a completed structure. Without stop logs the dam could not appreciably affect water levels. The stop logs were not placed in the dam until 1898, and then, only under a contract with the Crown, represented in this matter by the Commissioner of Public Works of the Province of Ontario, whereby the dam was to be controlled and operated by the Crown, through the Commissioner, *in the interest of navigation.* The company covenanted that the Commissioner should have the right to regulate the height of the water and to control the dam as might be necessary (R. 237). The history of this matter is recounted in the Final Report of the International Joint Commission, referred to above. It appears from this report that the only effect of Norman Dam was to maintain the level of the waters of the lake at normal summer levels *in the interests of navigation,* a matter in which the Government of the United States was equally concerned. It should, however, be observed that the regularization of the summer levels in the interest of navigation tended to produce an equalization of flow and, in the case of the power plants at the outlets of the Lake of the Woods, a small increase in head. Consequently, the control designed to promote the interest of navigation, produced incidental benefits to power. After the lake had been brought completely under international control by the Convention, in 1925, the new Norman Dam, which was built in 1924-26, to replace the old structure, was used to regulate levels in the interests of power as well as navigation; the protection of the power interests having been brought into the scheme by the operation of the Lake of the Woods Convention.

With regard to the exercise of control of lake levels through the utilization of Norman Dam, the matter was regulated entirely by the Crown acting through the Com-

missioner of Public Works of the Province of Ontario from 1898 until 1919. In the latter year the Government of Canada and the Government of the Province of Ontario joined in placing the regulation of the levels of the Lake of the Woods under the Lake of the Woods Control Board consisting of four qualified civil engineers, two to represent the Dominion of Canada and two to represent the Province of Ontario. (R. 237; 238).

It was the duty of the Control Board to regulate the lake and maintain the levels as nearly as might be between 1056 and 1061, which is substantially the same type of regulation as that which was subsequently established by the Convention, and the regulation was required to be in the interests of navigation, power and other interests, both on the lake and on the river below.

To sanction this scheme for a joint control, "concurrent legislation" was enacted, the Dominion Statute being entitled "The Lake of the Woods Control Board Act, 1921," and the Ontario Statute being entitled, "The Lake of the Woods Control Board Act, 1922." The two Acts conveyed to the Board the combined authority of the Dominion and Province.

The "concurrent legislation" was held in abeyance for the time being and the Lake of the Woods Regulation Act, 1921, was enacted by the Parliament of Canada (R. 240). The effect of this statute was to place the works in question, including Norman Dam, under the exclusive legislative authority of the Parliament of Canada and, accordingly, the Lake of the Woods Control Board was reconstituted by appropriate action (R. 242).

The Board thus reconstituted, continued to exert complete control over the levels and outflow of the lake, until 1928. In that year, the Dominion of Canada and the Province of Ontario, with the concurrence of the Prov-

ince of Manitoba, entered into an agreement providing for the simultaneous repeal of the Lake of the Woods Regulation Act, 1921, and the bringing into force in the place thereof of the "concurrent legislation" referred to above. The Lake of the Woods Control Board was reappointed so as to enable it to operate under the "concurrent legislation." (R. 243; 238-240; 244).

Meanwhile the international aspect of the regulation of the level of the lake had gradually come into prominence. In 1902 the development of navigation, and, particularly, the improvement of Warroad Harbour, became active in the United States. This emphasized the need for comparatively high and dependable summer levels in the lake, and in May, 1905, the Government of the United States formally suggested to the Government of the Dominion of Canada that Norman Dam be so operated as to prevent the level of the Lake of the Woods from falling below the datum of 7·2 on the Warroad gauge, i.e. 1060·8 sea-level datum. It was found that it would be impossible to maintain a minimum stage of 7·2, as requested, during low water, without constructing a dam in the eastern outlet of the lake; but this conclusion was not officially communicated to the Government of the United States. It is, however, noteworthy that the object of the regulation as carried on by the Commissioner of Public Works of Ontario was the maintenance of summer levels in the interest of navigation, the same matter with which the United States Government was concerned. The only representations made by the United States Government to the Government of Canada in this period, indicated that the Government of the United States was equally desirous of securing the maintenance of these levels in the interests of navigation. The United States Government did not make any diplomatic repre-

sentations protesting against the action of the Canadian governmental authorities in thus regulating the levels of the lake. On the contrary, the only diplomatic action taken was to urge the maintenance of even higher levels, and the action of the Canadian authorities in maintaining the levels established at Norman Dam in the interest of navigation, can appropriately be regarded as action meeting with the full approval and concurrence of the United States Government. (Appendix, infra p. 124.)

The International aspect became more active after the conclusion of the Boundary Waters Treaty, 1909. The two Governments, by identical letters of reference, in 1912, referred to the International Joint Commission for examination and report, the question of securing "the most advantageous use of the waters of the Lake of the Woods and of the waters flowing into and from the lake on each side of the boundary for domestic and sanitary purposes, for navigation and transportation purposes, for fishing purposes, and for power and irrigation purposes, and also in order to secure the most advantageous use of the shores and harbours of the lake and of the waters flowing into and from the lake . . ." (R. 258, 259).

After a long and intensive study of the questions referred—extending over a period of four years and including eight public hearings—the Commission submitted its Final Report to the two Governments, on the 12th June, 1917. The Final Report, to which reference has already been made, set forth definite recommendations as to the regulation of the lake level and as to the outflow from the lake. (Appendix F; infra p. 125). The principles embodied in the recommendations were accepted by the two Governments, by an exchange of notes, early in 1919 (v. R. 258).

The Lake of the Woods Convention embodied the recommendations of the International Joint Commission in the form of a treaty between the two countries, signed on the 24th February, 1925, and subsequently ratified. Accordingly, the regime of control and regulation, after a period of investigation and study, became completely international in its character.

This regime involved the interference with the natural levels of the lake and consequently the flowage of lands in the United States bordering thereon. Article VIII provided that a flowage easement should be permitted up to elevation 1064 sea-level datum and that the United States should assume all liability to the owners of the land bordering on the lake in the United States for the cost of such easements. Article X provided for the apportionment of costs of the undertakings of the United States under Article VIII (which included the cost of the acquisition of flowage easements) the Government of Canada paying to the Government of the United States the sum of $275,000, together with one-half of the excess of such cost over that sum.

Appropriate legislation was enacted by Congress (Act of May 22, 1926, 44 Stat. 617, as amended by the Act of April 18, 1928, 45 Stat. 431), in which the Secretary of War was required to acquire, by purchase or condemnation, " flowage easements up to elevation 1064 sea-level datum upon all lands in such State bordering on the Lake of the Woods, Warroad River and Rainy River, . . . "

Being unable to secure these flowage rights on various tracts of lands by purchase, a condemnation proceeding was instituted, in which was included lands owned by the present petitioners.

Proceedings were commenced by a petition in Condemnation Proceedings, dated the 18th July, 1928 (R. 2-6). The petition was amended by order of the District Court of the United States for the District of Minnesota,

Sixth Division (R. 6-7), and the amended petition is set forth in the Record (R. 7-11). Commissioners were appointed and the time and place of their first meeting fixed by order of the Court, dated the 25th September, 1928. (R.11-12). The Commissioners made their report and award on the 4th May, 1929 (R. 13-14). The Commissioners awarded the sum of $3,660 in respect of Karlson's lands; and the sum of $1,296.50, in respect of Olson's lands; and the sums of $640.70 and $3,195.80 respectively (or $3,836.50 in all), in respect of Brewster's lands.

Both the United States of America and the landowners, namely Karlson, Olson and Brewster appealed from these awards (R. 15-20). The United States of America complained that the awards were excessive and the landowners complained that they were grossly inadequate.

The appeals took the form of trials before the Court, Hon. John B. Sanborn, District Judge presiding, and a jury. They were tried together in the City of St. Paul, the trial commencing on the 22nd January, 1931 (R. 21).

Upon the trial the petitioner offered evidence which is described in the bill of exceptions as testimony " as to the power resources on the Winnipeg River and the relation of the Lake of the Woods thereto " (R. 24). The respondent objected to the introduction of any evidence purporting to show that the value of petitioner's land was enhanced by virtue of its availability as one of many necessary units in the execution of any comprehensive plan to increase the storage capacity of Lake of the Woods. This objection was sustained, but as inquiries of a similar nature (power resources on Winnipeg River and relation of Lake of the Woods thereto) (R. 34) were continued, the respondent moved the Court (R. 136) for leave to offer testimony out of order for the purpose of laying a foundation for objection to the admission of any evidence of that character. This motion was allowed (R.

136), and the respondent then laid before the court all of the physical characteristics of the lake, the multiplicity of titles in the governments and citizens of the United States and Canada, Minnesota, Manitoba and Ontario (and of forty bands of Indians in Canada), the laws and treaties governing the use of the waters of the lake, the conflict of interests, public and private, in the use of these waters, and the necessity of reconciling these interests to a regimen of levels that would accomplish the greatest aggregate benefit to all, and submitted this evidence together with other proof hereinafter noted, as an absolute bar to any influence upon the value of petitioner's land due to the fact that it was physically adapted to form a part of a storage reservoir. The Court then ruled (R. 27) that evidence of enhanced value of petitioner's land by reason of its adaptability to reservoir uses and of the benefits that such use might yield in the development of power at various natural sites on the Winnipeg River should not be considered by the jury as an element of value in arriving at the damages to which the landowner was entitled.

To perfect the record on this issue the petitioner made offers of proof all directed to the subject matter first raised, namely " power resources on the Winnipeg River and the relation of the Lake of the Woods thereto " (R. 24, 27-83). The testimony proposed in these offers of proof was excluded by the Court. It was conceded by petitioner's counsel (R. 162) that " the facts which are offered to be proved do not bear upon the question of any other value except the value of the flowage easements and the reservoir value of the property."

The issue thus raised was whether testimony of potential utility of the petitioner's lands to water-power development was admissible as evidence of its value under the special circumstances of this case.

The cases were tried, with the evidence as to special adaptability excluded, and verdicts and judgments were entered on the 13th February, 1931 (R. 134-135). The amounts of the awards by the Commissioners, the amounts claimed by the petitioners, and the verdicts of the jury are indicated by the following table:—

Name of Landowner	*Amount of Award*	*Amount Claimed*	*Verdict of the jury and Judgment*
Karlson	$ 3,600 00	$ 8,000 00	$ 880 00
Olson	1,296 50	3,000 00	490 00
Brewster	640 00 3,195 00	2,000 00 7,000 00	900 00

The petitioners being dissatisfied with the amounts awarded by the verdicts and judgments, appealed to the United States Circuit Court of Appeals, Eighth Circuit, and ultimately to the Supreme Court of the United States of America.

ARGUMENT

Upon the facts just summarized, the question presented for decision may be stated more specifically than was possible at the beginning of this brief. It is a two-fold question and may be thus expressed:—

(1) *Was there at any time, and by any possibility whatever, a market in which flowage easements could be sold on the basis of their value for reservoir purposes?*

The Government of Canada confidently submits that there was not.

(2) *Even if such a market was a theoretical possibility, was not that possibility too remote and uncertain to be submitted to the jury as an element of value?*

The Government of Canada with equal confidence submits that it was.

These two aspects of the question involved will now be examined seriatim.

I.

THERE NEVER WAS AND NEVER COULD HAVE BEEN ANY PURCHASER OF EASEMENTS FOR RESERVOIR USE EXCEPT THE EXPROPRIATING AUTHORITY

A fallacy lurks in the "special adaptability" theory of market value when applied to the facts of this case. The fallacy consists in assuming, in the face of opposing facts, the existence of private purchasers in whose estimation the availability of the lands for reservoir use would have constituted an element of commercial value. This assumption, once made, becomes the basis for the plausible argument which is reflected in the dissenting opinion of Judge Booth in the Circuit Court of Appeals. If there were a market (so the argument goes) and if Olson, Karlson and Brewster might have resorted to it, then it would be unjust not to award them a corresponding benefit.

That there was at no time a market for the flowage easements becomes clear when the facts are reviewed.

The basic fact is that only in Canada could the dam be erected which was essential to the creation of a reservoir. In Canada it could be erected only by Governmental action or by an agency to which Governmental authority was given.

Before the original flowage the fact of the physical adaptability of the lands in question for reservoir use was, of course, demonstrable. It was a mere matter of topography. At that time, however, no private person or group would have given value for flowage easements with a view to reservoir use. This results inevitably from the circumstance that any private person or group contemplating reservoir development would necessarily

have been in one of two positions: either hopeful of obtaining governmental authority or actually in possession of it. In the former event, mere hopefulness of obtaining a grant would not have justified a large investment in flowage easements, for disappointment would have meant ruin. Moreover even if Canadian governmental authority was assured or had actually been obtained, purchase of easements in the United States would have been unnecessary; for in that event the only recourse of American landowners would have been against Canada through such a treaty as in the instant case was in fact made. When, therefore, in 1887 the Rollerway Dam was built with Canadian governmental authority and the lands of the petitioners were flowed, no damage was done which could by any possibility be measured in terms of any other value than that inherent in land useful for ordinary agricultural or riparian development.

This being true in 1887, it was true likewise when in 1898 the Norman Dam was substituted for the Rollerway Dam by the co-operation of the Province of Ontario with the Keewatin Power Co. Had the lands in suit been dry at that time, the considerations above outlined would have required the conclusion that there was in 1898 no element of reservoir value for which anybody would pay a cent. The fact that the lands were actually submerged, to the extent that the Rollerway Dam had raised the lake level, gave them no other element of value than that which they would have had if dry. As nobody would have given reservoir value for the lands before they were flowed, so nobody would have given such value after they were submerged.

If there was in 1887 no market for flowage easements measured otherwise than in terms of the ordinary taking of agricultural land; and if the same thing was true in

1898, nothing that subsequently occurred could create the special value which was non-existent at the outset. The Treaty of 1909 was by its terms inapplicable to cases of flowage that had already arisen and to those covered by special agreement (infra, p. 104); and the Lake of the Woods situation had existed for years and was later covered specifically by the Lake of the Woods Convention, 1925. Even if applicable, the Treaty of 1909 created no elements of market value and threw no light upon the problem now before the Court.

Nor did the Convention of 1925 give to flowage easements upon the lands in suit any element of market value not already possessed by them. The Convention merely recognized the justice of paying to American landowners damages for the injury theretofore done them by flowage and the value of which they would in future be deprived by its continuance. The doing of justice in both these ways was assumed by the United States and Canada through machinery to be set up and operated by the former. An Act of Congress was accordingly passed providing for the ascertainment of and payment for past damage; and this must be assumed to be an adequate provision. (Act of May 22, 1926, as amended by the Act of April 18, 1928; Appendix infra, pp. 118 to 121.) To compensate for the future maintenance of the Treaty-level the United States undertook to exercise the power of eminent domain; and it is the proceeding, thus undertaken, that is now before the Court. In other words, under the provisions of the Act of Congress above referred to passed pursuant to the Convention of 1925, a fundamental difference was recognized between past damage and future appropriation. As to the former, the Secretary of War was authorized to make an inquiry; provision being made for due notice and opportunity for hearing and for a report to Congress of

the amounts found to be equitably due to the claimants. With respect to the appropriation of easements for future flowage, the method of determining compensation was entirely different. The proper governmental authorities were instructed by Congress to begin a proceeding for condemnation in the usual form and therefore the considerations which could enter into a determination of compensation were such only as are relevant in a judicial proceeding.

While, therefore, the United States by treaty undertook to follow both the two courses above outlined, nothing in the Convention requires the United States to pay to landowners anything more than the fair market value of the right to be acquired; and this, for the reasons above given, means such sum as is ascertainable without reference to an imaginary reservoir use. The verdict of the jury in the instant cases settles what this sum is.

It is, of course, true that from the time that the Treaty of 1909 was made, the local atmosphere has been surcharged with speculation. The expectation that sometime or other the United States or Canada or both would almost certainly pay something to the landowners necessarily led to speculation as to what such governmental payments would be. This condition became acute after the Report of the International Joint Commission was filed in 1917, foreshadowing as it did the Convention of 1925. But speculation respecting what possibly could be gotten from expropriating governments is not an element of market value recoverable in a judicial proceeding. There is in fact no limit to speculation in such cases; and this is well illustrated by what has happened in the three cases before the Court.

The petitioner Randor G. Karlson, on August 10, 1921, acquired from Alfred F. Green about 123 acres.

The consideration mentioned in the deed was $1.00 (R. 221, et seq.). He testified that he had altogether 160 acres (R. 99). He offered to prove that he bought this land because it was valuable for storage and flowage purposes (ibid.); that he paid a higher price for this reason (R. 100); that he purchased the 120 acre lot at a sacrifice sale (ibid.) from his brother-in-law Green who had paid $175 (R. 103); that the fair market value of the flowage easement was $44,000 (R. 101); that after the land was overflowed it was worthless (R. 102). The Commissioners had awarded him $3,600. He appealed, and, in the Notice of Appeal to the District Court, his counsel presented his claim for only $8,000, instead of $44,000 (R. 17). When the case came on for trial, the speculative estimates of value had undergone another change, and counsel offered to prove a value of $9,400. (R. 55). The jury awarded him $880 (R. 134).

The petitioner Harry Brewster on February 14, 1923, acquired from L. H. Harrison about 160 acres. The consideration named in the deed was $1,500 (R. 215). Apparently he got altogether 220 acres (R. 95). He offered to prove that he bought the 160 acres solely because it was reputed to have a storage and reservoir value (R. 94) and that the value and fair market price of the easement was $60,000 (R. 95). He testified that after the submersion the land below contour 1064 was valueless (ibid.). The Commissioners had awarded him $3,835. He appealed, and, in the Notice of Appeal to the District Court, his counsel presented his claim for only $9,000, instead of $60,000 (R. 18-20). At the trial the estimates again changed and counsel offered to prove a new value of $13,300 (R. 55). The jury awarded him $900 (R. 135).

The petitioner Elias A. Olson made entry May 8, 1923 (R. 167 et seq.). He testified that he was born in

Sweden, had worked there on dam construction and learned there the value of lands for reservoir purposes (R. 96). He offered to prove that he learned there that lands used for flowage and storage purposes had an additional value (ibid.); that before filing for entry he went to Canada and saw some of the dams and hydro-electric plants involved in this case (R. 96-97) and he filed because of this high value (R. 97) and that the value of the easement was $16,000 (R. 98). He had 56 acres and the submerged land had no value (R. 98). The Commissioners had awarded him $1,296.50. He appealed, and, in the Notice of Appeal to the District Court—doubtless under restraint exercised by his counsel—he claimed only $3,500, instead of $16,000 (R. 17-18). By the time the case had come on for trial he had evidently regretted the restraint exercised in drafting the Notice of Appeal and an offer of proof for a new value of $10,800 was made (R. 55). The jury awarded him $490 (R. 134).

These three petitioners, having bought for speculative purposes and having had visions of $44,000, $60,000 and $16,000, respectively, (which under the advice of counsel they modified to $8,000, $9,000 and $3,500, respectively) were naturally dissatisfied with the Commissioners' awards of $3,600, $3,835 and $1,296.50. Having appealed to the jury and having been allowed by the jury only $880, $900 and $490, respectively, they are naturally still more disappointed. But it does not appear that they paid much for their lands. They bought as a speculation—to see what they could collect from Canada or the United States. Apart from such speculation, there was no evidence as to any real market. But a vendor and vendee cannot, by placing a high speculative value (or any speculative value) upon what it is hoped can be recovered from the United States, thereby fix the amount which the United States must pay.

In the light of the foregoing considerations, it is respectfully suggested that the so-called special availability value of the lands in suit has no relation to any value inherent in the lands themselves but is merely a high-sounding name by which to describe the speculative possibility that large but uncertain sums of money could at some time and in some way be secured from the expropriating governments. If this view is accepted by the Court an affirmance of the judgment appealed from will be a necessary consequence.

II.

THE OBSTACLES IN THE WAY OF RESERVOIR CONSTRUCTION BY PRIVATE ENTERPRISE MADE THE POSSIBILITY OF A RESERVOIR USE OF THE LANDS TOO REMOTE AND UNCERTAIN TO CONSTITUTE AN ELEMENT OF VALUE

If the facts do not, in the judgment of this Court, exclude all possibility of such a market as that for which the petitioners contend, it is respectfully submitted that such a possibility was so remote that its submission to the jury would have been merely an invitation to speculate at the expense of the Government of the United States.

Under this general proposition certain subordinate matters require consideration.

1. The Principles of Law governing the recognition of special adaptability of lands as an element of damage.

The basis upon which compensation for lands taken should be assessed, alike in the English, Canadian and United States law, is their value to the owner at the time of the taking, and not their subsequent or potential value to the taker. The reason for this rule is that the power of eminent domain is granted in order to carry out a public purpose in the interest of the public. It interferes with the rights of the owners of property, and provides for just compensation in order to indemnify them against their loss. The owners are precluded from receiving, as compensation, the added value which results from the exercise of the power and is intended to accrue to the public and in which they share as members of the public. The test is not, what the public authority taking the

land will gain by carrying out the project, but what the person from whom it is taken will lose by having it taken from him. (*Cripps on Compensation*, 5th Ed. p. 102; *Secretary of State* v. *Charlesworth*, L.R. (1901) A.C. 373; *City and South London Railway* v. *St. Mary Woolroth*, L.R. (1905) A.C. 1; *Cedars Rapids Power Co.* v. *Lacoste*, L.R. (1914) A.C. 569; and cases cited at 11 L.R.A. (N.S.) 996).

The attention of the Court is invited to the discussion of the legal principles in the leading English and Canadian cases, which should be helpful in determining this question. Reference will also be made to the leading United States decisions, which establish the principles governing this appeal.

A.

Discussion of the legal principles of special adaptability by the English Courts.

The law adopted by the English Courts in regard to special adaptability is set out with great clearness by Lord Moulton in *In re Lucas and Chesterfield Gas and Water Board*, L.R. (1909) 1 K.B. 16, and his exposition of this branch of the law of compensation has been accepted and approved in more recent cases by both the Privy Council and the House of Lords. The facts of this case are briefly as follows. The Chesterfield Gas and Water Board was incorporated by a special Act of Parliament and was given authority in 1904 by a further Act of Parliament to construct a storage reservoir at a site possessing peculiar natural advantages for that purpose, both on account of the general configuration of the land and the character of the underlying strata. The land on one side of the valley site belonged to a Mr. Lucas and on the other side to the Duke of Devonshire.

Notice to treat was accordingly served by the Board and an umpire appointed to determine the compensation. Appeal was taken from the umpire's award to the King's Bench Division and thence to the Court of Appeal. The pertinent parts of Lord Moulton's judgment in the Court of Appeal are as follows:—

"The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule that this value is to be estimated as it stood before the grant of the compulsory powers. *The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses.* Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.

"At a very early date in the history of this branch of the law there arose what is known as the question of 'special adaptability.' The phrase is not a happy one, for special adaptability for some purpose or other is the very basis of the market value of all land, except, perhaps, land that in all respects falls below the average. In agricultural land extra fertility, in town lands advantages of site, are true cases of special adaptability for farming or building purposes. These tend so directly to increase both the value and the market price of lands in the hands of a private owner that it has never been doubted that he could urge them in augmentation of the compensation which he was entitled to receive. The question has arisen only in the cases where the special adaptability is for purposes for which lands are required only when used for works of public utility, which are naturally different from the uses to which lands are put while in private hands, and which therefore do not necessarily influence the price which such lands command in the market.

"Ought the owner to be entitled to higher compensation by reason of the, to him, useless peculiarities which the lands possess? No better example of the problem could be found than that which we have in the present case. The land in question is by its position and conformation marked out as a favourable site for an impounding reservoir to collect water for the public supply of a district. The peculiarities which make it suitable for that purpose add nothing to its value as agricultural or grazing land, which I will assume to be the only alternative uses. A public authority obtains powers to take it for a reservoir; ought it to pay any higher price than is represented by its agricultural or grazing value? Is not any price in excess of this a violation of the canon that you are only to give that which represents its worth to the seller, and that you are to disregard all questions of its worth to the buyer?

"The decided cases seem to me to have hit upon the correct solution of this problem. To my mind they lay down the principle that *where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it.* But when the special value exists also for other possible purchasers, so that there is, so to speak, a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration, just as he would be entitled to have the fertility or the aspect of a piece of land capable of being used for agricultural purposes." (Pp. 29, 30 and 31.) (Italics ours.)

It is obvious that the lands surrounding the Lake of the Woods fall within the first of the two categories set out above by Lord Moulton, just as the lands belonging to Mr. Lucas in the case just cited fall within the second category.

The distinction is clearly evident and is well illustrated by contrasting the position of the lands surrounding the Lake of the Woods with those acquired from Mr. Lucas. The Lake of the Woods is an international body

of water and its use as a storage reservoir is dependent upon international agreement. The lands in Minnesota are to be acquired in pursuance of treaty obligations and only the United States has authority to acquire them in that way. There is thus no open market, however limited, in which the Lake of the Woods could be acquired for storage purposes; it is essentially a matter to be dealt with by the United States and Canada alone.

The lands acquired from Mr. Lucas, on the other hand, besides being specially adapted for reservoir purposes, were situated within a reasonable distance of several large urban centres, any one of which might quite conceivably have obtained parliamentary powers of purchase. To quote Lord Moulton again:—(page 31)

> "Although a large reservoir is not a need that ordinarily occurs in the experience of individuals, yet it is a recognized and often occurring need in the experience of the community, and in a densely populated country like England it may well happen that some out of the way tract of land suitable by its position and conformation to be formed into a reservoir is capable of being useful in this way to more than one locality, and may thus be the subject of competition between them, and may thus command in the market a corresponding price."

In the case of the Lake of the Woods, this element of a competitive market is necessarily lacking, hence, no compensation should be paid to the landowners in Minnesota on account of special adaptability for reservoir purposes.

A further quotation from Lord Moulton's judgment makes this view still clearer; referring to the fact that the situation and conformation of the land in question was such that it might readily be foreseen that it would sooner or later be used for reservoir purposes, as is also the case with the Lake of the Woods, he says: (p. 35).

> "The scheme which authorizes the new reservoir only entitles the owner of the land to receive as compensation

the value of the land unenhanced by that scheme, and, unless its situation and peculiarities create a market for it as a reservoir site for which other possible bidders exist, *I do not think that the single possible purchaser that has obtained parliamentary powers can be made to pay a price based on special suitability merely by reason of the fact that it was easy to foresee that the situation of the land would lead to compulsory powers being some day obtained to purchase it.* No element of that which economists term 'value in use' can, in my opinion, increase compensation, unless it is either a 'value in use' to the seller or a 'value in use' to persons other than the proposed purchaser so as to introduce the element of competition as a factor in fixing price." (Italics ours.)

B.

Discussion of the Legal Principles of Special Adaptability by the Canadian Courts.

The principles of land valuation in a proceeding somewhat similar to the present one, and the application of special adaptability are thus described in the leading Canadian case on this subject, namely, *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste,* L.R. (1914) A.C. 569, decided by the Judicial Committee of the Privy Council, the final court of appeal,—

"For the present purpose it may be sufficient to state two brief propositions:—(1) the value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

"Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking, (though adaptability, as pointed out by Fletcher Moulton, L.J. in the case cited,"—i.e. the Chesterfield case quoted above—" is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is

> merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.". (At p. 576.)

Market value is the governing factor; and where there is no market for the feature of special adaptability, attaching to the land in question, that feature cannot be given consideration in estimating the market value.

The same cause was again before the Privy Council quite recently on a second appeal from the award of the arbitrators and the principles set out above were again affirmed.

> "The real question to be investigated was, for what would these . . . subjects have been sold had they been put up to auction without the Cedars Power Company being in existence with its acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers." (*Lacoste v. Cedars Rapids Power Company*, (1928) 2 D.L.R. 1, at p. 5 (quoting and affirming Lord Dunedin's statement. L.R. (1914) A.C. 569, at p. 579).

A further difference arises from the fact, which will be developed later in this brief, that the use of the shores of the Lake of the Woods for a reservoir was, and is, entirely dependent upon the obtaining of governmental approval and authority, not only from the Government of the United States, but also from the Government of Canada and other governmental and international authorities. It has been decided by the Canadian Courts that the necessity for obtaining governmental consent or approval is a very important factor in assessing compensation. When a claim is based upon adaptability for a special purpose and the use of the lands in question for that special purpose is dependent upon obtaining governmental approval or consent, the hope or expecta-

tion of obtaining that consent cannot be an element in the valuation of lands acquired by eminent domain.

This was decided in *Rex* v. *Wilson* (1914), 15 Exchequer Court Reports, p. 283. In that case Sir Walter Cassels said—

> "The market value of the water lot is the proper basis for the assessment of compensation, but where that value may be enhanced by the hope or expectation of obtaining authority to erect structures on the lot, where there is no evidence of market value to guide it, the Court will not assess compensation on a hope or expectation which cannot be regarded as a right of property in the defendant."

Later at page 289, he says,—

> "To make the property fully available there must be an approval, and the title to erect on the water lot would not be complete until such consent had been procured."

That case was followed by the Court of Appeal of Ontario *In re Snow and the City of Toronto,* 56 O.L.R., p. 100. See the judgment of Ferguson, J.A., on page 108, in which he quotes Sir Walter Cassels in *Rex* v. *Wilson,* pages 290 and 291, as follows:—

> "In the case before me . . . there is no obligation on the part of the Crown to approve of the construction of works. At the time of the expropriation no such right had been obtained; and if the authorities I have quoted are correctly decided, it would seem to me that this hope of obtaining such approval could not be an element within the meaning of our statute."

Mr. Justice Ferguson goes on to say:—

> "The reasoning of the judgment of Sir Walter Cassells appeals to me as sound, and appears to establish that, if the market value has been enhanced by a hope or expectation, the claimant is entitled to the market value, but that the hope, expectation, or chance of obtaining from the Crown, in the right of the Province, power to fill in the water lots or to interfere with the rights of riparian owners or of obtaining from the Dominion of Canada authority to obstruct navigation by the filling in and building upon the water lots is not an element of value that the arbitrator may take into consideration.

"The principles enunciated in the Wilson case seem to accord with the views adopted by the Supreme Court of Canada in *Canadian Northern Railway Co.* v. *Billings*, 31 D.L.R., 687."

The claim is based upon use for reservoir purposes and it should be noted that the lands in question cannot be used for reservoir purposes without the consent of the Government of the United States, the authority which is expropriating the flowage easements in this instance. The allowance of the petitioners' claim would involve the valuation of the prospect of their getting the consent of the Government of the United States to the use for reservoir purposes. The Court of Appeal of Manitoba, in a case involving similar principles, has decided that such a prospect cannot be taken into account in arriving at the value of property expropriated for public purposes.

In *McNichol* v. *Winnipeg*, 12 M.R., p. 305, a case in which the City of Winnipeg was acquiring property for street extension purposes, it was decided that, in fixing the value of the land taken by the city, the land must be treated as undivided land and not as subdivided, because in the subdivision of the land the consent of the city to such subdivision and the approval by it of the plan is necessary, and therefore the value of the land cannot be taken to be enhanced by the prospect or possibility of, or its adaptability for, subdividing in a certain way. At page 308 the Chief Justice of the Court of Appeal states:—

"As above mentioned a subdivision will greatly enhance the value of the plaintiff's land, but the right to subdivision and the placing of streets which the City must take care of and for which they are responsible is subject to their control and so the plaintiff must lay out the streets by the consent of the City or must leave his land unsubdivided."

C.

Statement of the Legal Principles of Special Adaptability by the United States Courts.

The general principles on which compensation for lands acquired by eminent domain are based appear to be substantially the same in the United States as in the English and Canadian law.

> "The requirement of the Fifth Amendment is satisfied when the owner is paid for what is taken from him. The question is what has the owner lost, and not what has the taker gained." *Boston Chamber of Commerce* v. *Boston*, 217 U.S. at 194. See also *Kerr* v. *Park Commrs.*, 117 U.S. 379, and *Shoemaker* v. *U.S.* 147 U.S. 282.

In the United States, the weight of authority sustains the same principle as is followed by the English courts.

> "Some cases say that the owner is entitled to the value of the property for the highest and best use to which it is adapted. This is true in so far as such adaptation affects the market value. But the proper inquiry is, not what is the value of the property for the particular use, but what it is worth in the market, in view of its adaptation for that and other uses. *Lewis on Eminent Domain*, 3rd Edition, par. 706.
>
> "Some of the cases hold that its value for a particular use may be proved, but the proper inquiry is, what is its market value in view of any use to which it may be applied and of all the uses to which it is adapted?" *Lewis on Eminent Domain*, 3rd Edition, par. 707.

Market value is the governing factor; and where there is no market for the feature of special adaptability, attaching to the land in question, that feature cannot be given consideration in estimating the market value.

This point is clearly shown by the following extract from *Nichols on Eminent Domain*, Second Edition, Vol. 1 at p. 671:—

> "Inasmuch as the compensation awarded when land is taken by eminent domain is the market value of the land for any use to which it is adapted and for which it is avail-

able, if it appears that the land is especially adapted and available for some public use, even if it be the very use for which it was taken, and that such adaptability and availability adds to its market value, this feature must be taken into consideration.....

"The very purpose of reserving in the people the power of eminent domain is to prevent the owner of a site especially available for a public work, but not of great value for other purposes, from trading upon the necessities of the public when it is sought to acquire his land for public use, and from compelling the public to pay for his land whatever figure he may name, and it seems clear that the owner has no such power. Consequently the market value of land peculiarly adapted for public use is its value apart from such adaptability, plus such sum as a purchaser would have added to that value by reason of the chance that the land might be required for public use and that in such case, to avoid the expense and dangers of litigation, the public agency requiring it would pay rather more than its value for other purposes, and whether as a matter of justice or public policy the land-owner is entitled even to this increment is a matter of doubt. If the use upon which such enhanced value depends requires the acquisition of numerous other parcels owned by other persons, the chance that the land will be acquired otherwise than by eminent domain is too remote to be considered. While these principles may not have been universally recognized, they have been set forth in recent cases of unquestioned authority and the soundness of the reasoning cannot be disputed."

These views are supported by *McGovern* v. *New York*, 229 U.S. 363, 46 L.R.A. (N.S.) 391. *New York* v. *Sage*, 239 U.S. 57. *Sargent* v. *Merrimac*, 196 Mass. 171, 81 N.E. 170. See also XXIX Harvard Law Review 428.

The views of the Supreme Court on this subject are very clearly expressed in *City of New York* v. *Sage*, 239 U.S. 57. This case arose through the action of the City of New York in acquiring by power of eminent domain the lands required for the Ashokan reservoir site in connection with an augmentation of the city's water supply. Commissioners were appointed to determine the com-

pensation payable to the various land-owners and Sage was by them allowed " the sum of $7,624.45 for land and buildings and the further sum of $4,324.45 for reservoir availability and adaptability."

The city appealed from this award and the case eventually reached the Supreme Court, the appeal being allowed as regards the sum awarded for availability and adaptability. The following extract gives the reasons for this decision:—

> " The decisions appear to us to have made the principles plain. No doubt when this class of questions first arose it was said in a general way that adaptability to the purpose for which the land could be used most profitably was to be considered; and that is true. But it is to be considered only so far as the public would have considered it if the land had been offered for sale in the absence of the City's exercise of the power of eminent domain. The fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price. But what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots. The City is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain.
>
> " Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give." (239 U.S. at p. 61.)

In the proceedings now before this Court, in which there are between fifteen hundred and sixteen hundred separate parcels of privately owned land involved, the chance that an interest in them all to the extent of a

flowage easement could be acquired otherwise than by eminent domain is certainly too remote to be considered.

In *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, the Supreme Court laid down the following rules:—

> (1) An owner of upland bordering on a navigable water which is taken under condemnation by the Government for the purpose of navigation is entitled to compensation for the fair value of the property, but he is not entitled to probable advanced value by reason of a contemplated improvement.
>
> (2) The owner of a separate parcel is not entitled to additional value resulting as a part of a comprehensive scheme of improvement requiring the taking of his and other property.
>
> (3) "Strategic value" cannot be allowed in condemnation proceedings: the value to the Government for a particular use is not the criterion. The owner is compensated when he is allowed full market value.

The decision of this Court in *Boom Company* v. *Patterson*, 98 U.S. 403 (1878) is particularly illuminating. That was a case in which a riparian landowner was the owner also of three adjacent islands in the Mississippi River, so situated that they were specially fitted, in connection with the nearest bank of the river, to form a boom of extensive dimensions. All that was required to form a boom, a mile in length and one-eighth of a mile in width, was to connect the islands with each other and the lower end of the island furthest down the river with the nearest bank. The project of so utilizing these islands was one which the owner himself could have undertaken and he was free to confer his rights on others. Even had the State been minded to create a monopoly for the use of the Mississippi or to give exclusive control and management of logs floating on it, such action would have been beyond its constitutional power. Obviously the adaptability of the islands for boom pur-

poses was a circumstance which the owner had a right to insist upon as an element in estimating the value of his lands when the Boom Company undertook to exercise its power of eminent domain. To this effect was the decision of this Court. Obviously, also, the facts of the case are in significant contrast with the facts of the instant case. There the landowner was possessed of property which had large commercial potentialities and there was no obstacle in the way of realizing them. Here the landowners could do nothing with their land except use it or sell it for agricultural or other similar uses. They are precisely in the position in which the landowner in the Boom Company case would have been if the company had been given a valid monopoly of the right to construct the boom.

That this is a sound analysis of a decision relied upon by the landowners in the Court below sufficiently appears from the comment upon it made in *United States* v. *Seufert Bros.*, 78 Fed. Rep. 520 (1897).

This latter case was a proceeding by the United States Government to condemn a right of way for a portage boat railway along the Columbia river. The judgment states:—

> "This evidence,"—i.e., as to the special availability for railroad purposes of the land taken—"was not admitted because I was of the opinion that, in estimating the value of land taken for a public use, its value for such use is not to be considered. The decision of the Supreme Court in *Boom Co.* v. *Patterson*, 98 U.S. 403 was thought not to apply to the case on trial, since the question of value there considered had regard to existing business wants, of which the owner might avail himself either on his own account or for general use. The use for which condemnation was sought in that case was for the construction of log booms in the Mississippi river adjacent to the lands condemned. The owner might use his land for this purpose on his own or on public account. The use was not necessarily a public

one, and required no public licence, so long as the navigation of the river was not obstructed. There is therefore no reason why the adaptability of the lands condemned for boom purposes was not a proper element to be considered in estimating the value of such lands. . . . .

"The claim that the extent of the private interest to be taken is to include, in addition to all the uses available to the owner, the value, if that is possible of attainment, of the public interest to be served, is in my opinion without equity, and against public policy." (At pp. 520, 521.)

The same view is held in *Five Tracts of Land* v. *U.S.*, 101 Fed. Rep. 661, where it was held that in the case of land acquired by the United States for a national park, the fact that the land is desired by the United States for a particular purpose is not an element of market value.

It should also be noted that, in all the cases cited above, the land was being taken outright and the owner was consequently to be paid the full market value. The present circumstances differ in this respect, that the land is not to be acquired outright; no transfer of title is to take place, the Government is merely to acquire an interest in the land to the extent of the right to flood that land to a maximum height of 1062·5 feet and to pay all damages caused by the water reaching that height, not continuously held at that level but fluctuating to lower levels from time to time. This circumstance, however, does not affect the principle, which relates solely to the question whether adaptability for a special use can be considered in the measurement of compensation.

D.

Conclusions.

It is submitted that the decisions cited establish definite principles of law, which should govern the issues in this appeal.

Special adaptability for reservoir use can only be considered if the special use is one that is valuable to the owner. It must be available to the owner in one of two ways: He must be able to use the lands for reservoir purposes himself; or else there must be some person, or persons—other than the expropriating authority—who could have acquired his land or a flowage easement therein and used it in conjunction with other lands or easements, for reservoir purposes.

If the owner can show that he could have, as a matter of legal and practical possibility, used his lands, together with the other necessary lands or easements, for reservoir purposes, he is entitled to compensation on that basis.

If, in the alternative, the owner can show that, as a matter of legal and practical possibility, some other person could have acquired the easement and the other necessary lands or easements, in order to establish and maintain a storage reservoir, the owner would be entitled to compensation on the basis of special adaptability; because such possible acquisition by the purchaser or purchasers in question would be an element in market value for which he should be compensated.

On the other hand, it will be shown that, in the circumstances of this case, the lands could not be used for reservoir purposes, either by the owners or by any other persons. The use for such purposes, by any person other than the governments of the two countries acting conjointly and exercising the power of eminent domain, would be legally and practically impossible, and could not be regarded as an element affecting market value or the measure of compensation, either directly or indirectly. To attribute reservoir value to these lands or easements would be to grant participation to the

owners, in economic values which did not exist at the date of the taking, and which are created for the first time as a result of the joint governmental action, and the exercise of eminent domain in furtherance of the joint project. Such a course would run contrary to the principles underlying the decisions which have been cited from the United States, Canadian and English Courts.

2. The specific application to the facts of this case of the Principles of Law above summarized.

The offers of proof rejected by the Trial Judge related to the power resources of the Winnipeg River and the relation of the Lake of the Woods to such resources. Their character is illustrated by the offers of proof by witness Adolph F. Meyer (R. 27-40). The proof so offered would have established the great value of the Lake of the Woods as a storage reservoir and that, in the absence of the treaty, power interests would have sought to acquire flowage rights and easements in order to establish such a reservoir.

The basic fallacy involved in the offers of proof, is that they assume that it would have been feasible to establish a storage reservoir. It would have been legally and practically impossible for any private interest to establish a storage reservoir in the Lake of the Woods. The only manner in which such a reservoir could be established is by the co-operation of the governments of the two countries utilizing the various national and international agencies and authorities, including the exercise of the power of eminent domain by the Government of the United States.

In order to appreciate the legal and practical impossibility of establishing a storage reservoir in any other manner, the position of a private enterprise seeking to

accomplish such an object—either for the purpose of improving its own water-powers or of selling additional water to the Winnipeg River interests—may be considered. The private enterprise, having acquired flowage rights over the petitioners' lands, could not utilize the lake for storage purposes. In order to do so, the enterprise would be compelled to acquire flowage rights over all riparian lands in the lake, and obtain the necessary consents from all governmental authorities: state and federal, provincial and dominion, and international, who were concerned in the matter. The obstacles that must be surmounted by such a private enterprise, in the circumstances of this case, may be presented under nine headings, which are lettered for the purpose of convenient reference.

A.

The multiplicity of titles made it impracticable to unite the privately owned lands bordering on the lake for reservoir purposes, in any way save by eminent domain.

The following basic data are submitted indicating the nature of the shore line of the lake and of the islands in the lake, and showing the state of the title of the lands subjected to the flowage easement on the Canadian side—

(1) The approximate shorelines of the Lake of the Woods and of the islands in the lake are,—

	Miles
(*a*) Total in Canada and the United States.	some 2,225
(*b*) Total in Canada.	some 2,085
Total in United States.	some 140

Statement by I. R. Strome re shore line of Lake of the Woods. R. 223-234.

(2) The total acreage in Canada between elevations 1059 and 1064, as taken from page 61 of the Final Report of the International Joint Commission as of date May 18, 1917,—

	Acres
Privately owned and filed on	3,408
Province of Ontario	13,043
Dominion (Manitoba)	14,427
Indian Reserves	8,652
Total	39,530

Final Report of International Joint Commission, May 18, 1917, p. 61; U.S. Government Exhibit No. 71; R. 278.

(3) The number of parcels of land held by private parties,—

(a) In Ontario as of November 30, 1920 . . . . . at least 723

(*b*) In Manitoba 0

Letter from L. V. Rorke to J. T. Johnston, Dec. 3, 1929, R. 225.

Statement by W. S. Gliddon in re lands granted in Manitoba, R. 227.

The very large number of private land titles on the Canadian side, exceeding 723 in number, presents a situation precisely corresponding with that dealt with by the Supreme Court of the United States in the *City of New York* vs. *Sage*, 239 U.S. 57. This situation, accentuated by the very large number of private owners of land on the United States shore of the lake, presents a state of affairs in which the union of the lots, using the words of Mr. Justice Holmes, "*would not have been practicable or have been attempted, except by the intervention of eminent domain.*" (239 U.S. at p. 61.) (Italics supplied.) The lake could not have been

legally constituted as a storage reservoir without the acquisition of flowage easements in respect to all of these outstanding titles, and it is clear that the possibility of acquiring them without the power of eminent domain is a contingency too remote to be considered as an element in estimating compensation.

B.

The ownership of a large part of the shore lands by the Province of Ontario made it impracticable for the land owners, or any persons other than the two Governments acting conjointly, to constitute a storage reservoir.

The ownership of a large part of the lands bordering on the Lake of the Woods, by the Province of Ontario, would have made it wholly impracticable for power interests in Manitoba, or for any other persons, legally, to constitute a storage reservoir. The Lake of the Woods could not be used for reservoir purposes without acquiring flowage rights in respect of these lands owned by the Province.

The shoreline of the Lake of the Woods bordering on the lake in Ontario approximates to some 2,050 miles as determined by scale from standard published maps; also the total acreage in Ontario between elevation 1059 and elevation 1064 is some 13,043 acres (supra p. 40).

This land with the exception of that portion incorporated in Indian Reserves, is wholly under the jurisdiction of the Province of Ontario, the larger part being Crown Lands owned by the Province. The Province of Ontario would have jealously protected the rights of the Province and the rights of the citizens of the province who were interested in the levels of the lake.

The major interests include:—

(1) The Lake of the Woods Milling Company with its power operated mills (Mill "C" established

in 1881 and Mill "A" established in 1887) in the Keewatin Outlet of Lake of the Woods, operating under water rights granted by the Ontario Government.

(2) The Town of Kenora's municipal plant, constructed 1892 (afterwards purchased by the Keewatin Power Company) located on the Eastern Outlet of Lake of the Woods, operating under water rights granted by the Ontario Government.

(3) The Keewatin Power Company's power plant at the Norman Dam, constructed in 1926, operating under water rights granted by the Ontario Government.

NOTE.—The increased discharge capacity from the lake necessary to the securing of the power storage range involved a decrease in the available power head at these three plants on the outlets of the Lake of the Woods.

(4) Lumbering interests operating on the lake which are best served by a high and uniform level and whose operations are based upon limits leased from the Ontario Government.

(5) Fishing interests operating on the lake which are advantageously served by a uniform level and whose operations are based upon licences issued by the Provincial Government.

(6) Foreshore properties owned or leased by Ontario citizens, who are most advantageously served by levels dependent upon their respective individual needs.

The petitioner's case is based upon the possibility of the petitioner, or some other person, particularly the Winnipeg Power interests, acquiring flowage rights in respect to the entire foreshore of the Lake of the Woods, so

as to be able to augment the power development of the river by regulating the Lake of the Woods levels. This would be entirely dependent upon the acquisition of flowage rights in respect to the Ontario Crown Lands. In view of the numerous and outstanding Provincial interests located around the Lake of the Woods, and wholly or largely dependent upon the levels of the lake for their well-being, it is inconceivable that, as a practical matter, the Ontario Government would have granted these rights in aid of a power development in another province. As a practical matter, it would have been impossible for the Winnipeg Power interests to have secured rights to a storage range on the Lake of the Woods to be used for the benefit of water-powers in the Province of Manitoba and this difficulty alone would have made it out of the question for these power interests to have undertaken to secure flowage rights in the United States or elsewhere along the lake shore.

C.

The shorelands were subject to four (five since the transfer of the resources to Manitoba) separate governmental jurisdictions, three of which are in Canada, namely, the Dominion, Ontario and Manitoba.

The fact that the lands bordering on the Lake of the Woods were subject to four (five since July 15, 1930) separate governmental jurisdictions with differing administrative policies, and each with its own particular interests to guard, rendered it impracticable for private power interests, on the Winnipeg River, in Manitoba, to have secured the flowage easements necessary to have permitted the use of the lake as a storage reservoir for power purposes in the interests of power development in Manitoba.

The Governmental jurisdictions within which the lands bordering on the Lake of the Woods in Canada fall, are recorded hereunder:—

(1) The Crown Lands bordering on the Lake of the Woods in Manitoba were administered by the Dominion Government from 1867 to the 15th July, 1930, from which date the administrative control passed to the Province of Manitoba;

(2) The Crown Lands bordering on the Lake of the Woods in Ontario have been continuously under the administrative control of the Province throughout;

(3) The Indian Reserves bordering on the Lake (some forty in number), have been under the administrative control of the Dominion Government throughout;

(4) In addition to the control over lands, the Dominion of Canada, throughout, has had exclusive power with relation to beacons, buoys, lighthouses, navigation and shipping, inland fisheries, interprovincial and international ferries, and international affairs.

These propositions are established by the following documentary evidence, set forth in the record, United States Exhibit No. 62, Division V of Canada's representation; extracts from pertinent Acts:—

1. *The British North America Act, 1867 (Imperial)* R. 230.
2. *The Manitoba Act, 1870 (Dominion)* R. 231.
3. *The Dominion Lands Act (Dominion)* R. 232.
4. *The Manitoba Natural Resources Act (Dominion)* R. 232.
5. *The Indian Act (Dominion)* R. 233.
6. *The Public Lands Act (Ontario)* R. 233.

The construction of a storage reservoir would have required the consent of all five of these governments, of which three were in Canada. Easements in the lands which are the subject of this appeal were, at all times, useless for reservoir purposes unless they could be combined with rights in all other riparian lands in the hands of a person who had not only those rights, but also the authority and consent of the five interested governments. *The possibility of obtaining the consent of the interested governments is a contingency too remote to be an element in compensation.* The allowance of this appeal could only be based upon the theory of evaluating the remote possibility of the petitioner, or some other interested person, being able to obtain the consent of all five of these governments.

D.

By reason of the withdrawal of Canadian lands from acquisition by private interests, it was legally impossible for any private person to use the Lake of the Woods as a storage reservoir.

At the time of the taking of these flowage easements, and for some years preceding, it was legally impossible for the petitioner, for the Winnipeg power interests, or for any other person, to acquire the right to flow Dominion or Provincial foreshore lands on the Lake of the Woods. Without such right, the use of the lake as a storage reservoir was legally impossible, and, consequently, could not be regarded as an element in assessing compensation.

The only authorities that could lawfully establish a storage reservoir were the two Governments, acting conjointly and, pursuant to the Boundary Waters Treaty, 1909, and the recommendations of the International Joint Commission, proceeding by treaty and with the

aid of statutory powers, i.e., under the procedure actually followed, which has resulted in this Appeal. The special use was one available only to the United States, the expropriating authority. A use available only to the expropriating authority can not affect market values and can never be an element in the assessment of compensation.

By reason of the fact that the Dominion and Ontario Governments—realizing the complexity of the problem of securing a regulation of the Lake of the Woods which would be satisfactory to all interests affected (including navigation, fishing, lumbering, power, domestic, sanitary and general foreshore rights), and appreciating the fact that, because of the importance and conflict of these interests, it was contrary to public policy to permit private enterprise to acquire the foreshore lands—withdrew all the ungranted foreshore lands from disposition inconsistent with the recommendations of the International Joint Commission for regulation of Lake of the Woods, *it was legally impossible for any power interests to secure flowage easements on these lands for the purpose of regulating the lake for the benefit of power.*

The record of these withdrawals follows:—

The Dominion Lands Act under which the Crown Lands in the Province of Manitoba were administered from 1872 to July 15, 1930, provides under Section 78 that "the Minister may set aside and reserve from entry for homestead or from sale as agricultural lands, any lands which he considers . . . to be required . . . for the protection of ponds, lakes or other water supplies, or for the purposes of a water power, harbour, landing, or townsite . . ."

(A certified copy of the Dominion Lands Act forms part of the record as Exhibit No. 66. R. 248.).

Under the authority of the above Act, Mr. J. B. Challies, Superintendent of the Water Power Branch of the Canadian Department of the Interior, on September 1, 1915, recommended to the Deputy Minister that the Department "reserve the area" along the margin of Lake of the Woods in Manitoba "from homestead entry or other disposition for a year or until the Lake of the Woods Reference before the International Joint Commission has been disposed of."

This recommendation was approved by the Deputy Minister and appropriate action taken, and on September 21, 1915, Mr. Challies was advised, by letter from the Agent of Dominion Lands at Winnipeg, that the Agent had made a check of the records, and had reserved all the lands which were available.

On February 24, 1916, Mr. Challies by a formal memorandum to Mr. N. O. Coté, Controller of Land Patents of the Department of the Interior, called attention to certain lands reported as being vacant in order to be sure that the reservation was correctly noted. In a communication from Mr. F. S. Checkley, Controller of School Lands of the Department of the Interior, to Mr. Challies, dated April 7, 1916, Mr. Checkley reported that a temporary reservation had been made of the school lands mentioned in Mr. Challies' letter of the 24th of February.

(Certified copies of the above correspondence form part of the record as Exhibit No. 66. R. 249-250.)

The foregoing establishes that as early as September, 1915, there was put into effect a blanket reservation of the vacant Crown Lands in Manitoba bordering on the Lake of the Woods.

By Dominion Order in Council dated March 27, 1922, the above blanket reservation was replaced by a specific reservation. The Order in Council provided that:

"Whereas in the report dated 12th June, 1917, of the International Joint Commission with respect to the levels of Lake of the Woods it is recommended among other things that flowage rights should be secured up to contour 1064 sea level datum on all lands bordering on Lake of the Woods; and that Canada should acquire and hold in perpetuity for this purpose the necessary lands on the Canadian side of the boundary;

"And whereas His Excellency the Governor in Council did by Order in Council of the 17th July, 1919, accept and approve of the recommendations of the International Joint Commission in the above matters, copy of which Order in Council was transmitted to the Government of the United States under cover of a dispatch dated the 21st July, 1919;

"And whereas certain of the necessary lands on the Canadian side of the boundary are Dominion Lands or School Lands which it is, therefore, desirable to place under definite reservation;

"Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of the Interior, is pleased to order and it is hereby ordered as follows:—

"(1) All the lands affected as set out in Schedule 'A' hereto which are Dominion Lands are hereby reserved and any other lands in the said Schedule 'A' which may later come under the control of the Crown in the right of the Dominion of Canada shall thereupon be reserved from any disposition inconsistent with the requirements in connection with the regulation of the Lake of the Woods as set forth in the above mentioned Order in Council.

"(2) All the School Lands affected as set forth in Schedule 'B' hereto, shall be similarly reserved as soon as other available Dominion Lands have been selected in lieu thereof as provided in Section 39 subsection 2 of the Dominion Lands Act."

(A certified copy of Order in Council of March 27, 1922, forms part of the record as Exhibit No. 66. R. 250.)

Coming to the action taken in the Province of Ontario, the Ontario Public Lands Act under Section 60 provides that: "In all sales . . . and other dispositions of public lands . . . the Minister may reserve from sale, any water power or privilege, and such area of land in connection therewith as he may deem necessary . . . "

(A certified copy of the Ontario Public Lands Act forms part of the record as Exhibit No. 66. R. 251.)

At a meeting of the Lake of the Woods Control Board on 4th November, 1920, it was decided that the Board should formally request the Ontario Government to reserve a flowage easement around the Lake of the Woods.

Accordingly on November 24, 1920, Mr. J. B. Challies, Member and Secretary of the Board, addressed a letter to the Honourable Beniah Bowman, Minister of Lands and Forests of the Ontario Government, calling attention to Page 35 of the International Joint Commission's final report wherein it is recommended—"It further believes that, as far as possible the two Governments, respectively, should reserve a flowage easement over all public riparian lands around the larger lakes on the watersheds in both countries to an elevation of at least 5 feet above extreme natural high water mark or to such other elevation as after investigation they may agree upon." He advised Mr. Bowman that it was "the opinion of the Lake of the Woods Control Board that action should be taken by the Province to reserve the necessary flowage rights."

On November 30, 1920, Mr. Bowman replied to Mr. Challies as follows: "I am giving instructions that in the disposal of all Crown Lands adjoining the above mentioned lakes (this included the Lake of the Woods), a reservation of flooding rights should be made as suggested."

In response to an inquiry on the part of Mr. J. T. Johnston, Director of Water Power and Reclamation, Mr. L. V. Rorke, Deputy Minister of Surveys of the Ontario Government, on November 27, 1929, advised Mr. Johnston as follows: "Referring to our conversation yesterday in reference to the action which has been taken in this Department regarding a reservation of flooding rights over Crown Land along the shores of Lake of the Woods, Rainy Lake and Namakan Lake, referred to in the letter of the Honourable, the Minister of Lands and Forests, dated November 30, 1920, I have to say that the instructions to make such reservation have been carried out in the disposal of Crown Lands along the shores of these lakes since that date."

(Certified copies of the above correspondence form part of the record as Exhibit No. 66. R. 252, 253.)

It is established therefore that the Province of Ontario as early as 1920 placed a reservation for flowage purposes on all Crown Lands bordering Lake of the Woods.

Summarizing the foregoing, it has been established:—

1. That the Crown Lands in Manitoba bordering on the lake were withdrawn from private entry as early as 1915.
2. That the Crown Lands in Ontario bordering on the lake were withdrawn from private entry as early as 1920.
3. That the purpose of the withdrawal was to prevent any private interests from obtaining flowage rights, and to conform with the recommendations of the International Joint Commission.

It is therefore submitted that it was legally impossible for any power undertakings to have acquired flowage ease-

ment privileges around the lake in Manitoba and in Ontario for the purpose of regulating the lake for the benefit of power—and in fact the established policy of the two said governments was effectually designed for the express purpose of preventing any such monopoly.

E.

The legal obstacles to exercise of flowage rights on Indian Lands by private parties made it impossible to acquire such rights, save by eminent domain.

In view of the large number of Indian Reserves bordering on the Lake of the Woods in Canada, subject to the administrative control of the Dominion Government in the interests of the Indians, *it would have been impossible for private power interests in Manitoba to have secured the right to flood any portion of these lands without the consent both of the Indians and of the Canadian Government acting on behalf of the Indians.*

The number of Indian Reserves in question and the governmental control exercised over the same, are set forth in the following:

There are some 40 Indian Reserves in Canada bordering on Lake of the Woods with a total foreshore length of some 250 miles in connection with all of which negotions would be required with the Government of Canada and with the Indian occupants, before foreshore flooding would be permitted.

(A certified copy of a map showing the number and location of these Indian Reserves forms part of the record as Exhibit No. 69, R. 263.)

With regard to the disposition of Indian Lands, Section 50 of the Indian Act provides that, "Except as in this Part otherwise provided, no reserve or portion of a reserve, shall be sold, alienated or leased until it has been

surrendered to the Crown for the purposes of this Part, but the Superintendent General may lease, for the benefit of any Indian, upon his application for that purpose, the land to which he is entitled, without such land being released or surrendered . . . "

Section 51 of the Act provides that, "Except as in this Part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of 21 years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of any officer duly authorized to attend such council by the Governor in Council or by the Superintendent General."

Section 54 of the Act provides that, "All Indian Lands which are reserves or portions of reserves surrendered, or to be surrendered, to His Majesty, shall be deemed to be held for the same purpose as heretofore; and shall be managed, leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Part."

(A certified copy of the Indian Act forms part of the record as Exhibit No. 62, R. 233.)

Summarizing the foregoing it has been established:

(1) that some 40 Indian Reserves border on Lake of the Woods with a total shore line of some 250 miles.

(2) that no portion of a Reserve shall be sold, alienated or leased except with the consent of the Canadian Government through the Superintendent General of Indian Affairs.

(3) that no release or surrender of a Reserve or portion of a Reserve shall be valid unless assented to by a majority of the male members of the band inhabiting the Reserve.

(4) that all surrendered portions of Indian Reserves shall be deemed to be held for the same purpose as before surrendered, that is for the benefit of the Indians.

It is submitted therefore, that because of the severe restrictions which are incorporated in and which must be adhered to, under the Indian Act it would have been practically impossible for private interests on the Winnipeg River or elsewhere to have acquired the right to flood the foreshore of the 40 Indian Reserves in question.

F.

The Lake of the Woods is a navigable water and hence subject to Dominion control.

It is submitted that because of the fact that the Lake of the Woods is a navigable water and hence is subject to Dominion control, it would have been impracticable for private power interests to have secured the right to regulate the lake in the interests of power alone; and that in view of the impossibility of securing this right these power interests would not have been warranted in making expenditures for the securing of flowage rights along the foreshore, even assuming the latter had been a practical proposition from other angles.

By the British North America Act, 1867, which forms the constitution of the Dominion of Canada, section 91 declares that the exclusive legislative authority of the Parliament of Canada was extended to "navigation and shipping."

(A copy of the British North America Act forms part of the record as Exhibit No. 62, R. 230.)

Under the Navigable Waters Protection Act, R.S.C., 1927, c. 140 (first passed in 1882), the Dominion Parliament legislated for the protection of its interests in navigable waters. Section 2 (*b*) of the Act provided that "'work' includes any . . . dam . . . or other structure . . . . and the approaches or other works necessary or appurtenant thereto, or any work, structure or device, whether similar in character to the foregoing or not, which may interfere with navigation." Section 4 provides that, "no work shall be built or placed in, upon, over, under, through or across any navigable water unless the site thereof has been approved by the Governor in Council, nor unless such work is built, placed and maintained in accordance with plans and regulations approved or made by the Governor in Council."

From this Act it will be apparent that the approval of the Dominion Government is essential to any structure interfering with navigation on the Lake of the Woods—a navigable water.

(A certified copy of the Navigable Waters Protection Act forms part of the record as Exhibit No. 63, R. 234.)

To summarize the foregoing, it has been established that the Lake of the Woods—a navigable water—is, so far as Canada is concerned, and in so far as the protection of navigation is concerned, under the administrative control of the Dominion Government.

It is therefore submitted that because of the Dominion control over navigation it would have been impracticable for private power interests to have secured the right to regulate the Lake of the Woods as a power storage reservoir without making full provision for the protection of navigation. The insistence of both the Dominion and the Province of Ontario upon the protec-

tion of navigation is more fully developed in Section G immediately following, which reviews the manner in which the outlets of Lake of the Woods have been controlled by the Dominion and Ontario Governments from 1898 to date.

Furthermore, the restriction upon the regulation of the lake levels resulting from this Dominion control over navigation was further intensified by the provisions and requirements of the Boundary Waters Treaty, 1909, whereby International restrictions were superimposed upon the use of the waters of the lake as a "boundary water." (Ar., pp. 65 et seq.)

G.

The Lake of the Woods outlets have been continuously controlled by the Governments of Ontario and of the Dominion, from 1898 to date.

Private interests could not have secured the lake as a storage reservoir for power purposes because of the fact that the regulation of the lake has been under Governmental control since 1898, and in consequence, private power interests not being able to acquire control over the outlets or the outflow through the same, would not have been warranted in attempting to secure flowage rights along the foreshore, even assuming that the latter had been a practicable proposition.

The record of Governmental control over the outlets follows:—

By an agreement in respect to the Norman Dam, dated June 22, 1898, between the Keewatin Power Company and Her Majesty, represented therein by the Commissioner of Public Works of the Province of Ontario, it was provided that "*whereas for the purpose of improving the navigation of the said lake it is expedient*

that the said dam should be improved by the addition of stop-logs and otherwise," the Company covenanted and agreed *"that the Commissioner shall have the right to regulate the height of the water and to control the dam as may be necessary."* (Italics supplied.)

It will be noted that the purpose of the regulation was the protection of navigation.

(A certified copy of this agreement forms part of the record as Exhibit No. 64, R. 237.)

As the development of the Winnipeg River Watershed proceeded, the Dominion and Ontario Governments, recognizing the complexity of the interests involved and the joint responsibilities of the two Governments towards the protection of these interests, agreed to place the regulation of the lake under a Joint Board. Accordingly, there was constituted the Lake of the Woods Control Board, consisting of four qualified civil engineers, two to represent the Dominion of Canada and two to represent the Province of Ontario.

(A certified copy of the Dominion Order in Council of January 21, 1919, forms part of the record as Exhibit No. 64. R. 237.)

(A certified copy of the Ontario Order in Council of February 13, 1919, forms part of the record as Exhibit No. 64. R. 238.)

It will be noted that the Control Board was required to regulate the lake and to maintain the level as nearly as may be, between elevations 1056 and 1061, i.e., regulate the lake in accordance with the recommendations of the International Joint Commission, in its Final Report, dated June 12, 1917; also that the Board was required to regulate in the interests of navigation (mentioned first), power and other interests both on the lake and on the river below.

The Lake of the Woods Control Board, as above constituted, satisfactorily served, for the time being, the purposes for which it was established. However, both the Dominion and the Ontario Governments recognized the desirability of giving the Board more definite administrative authority by means of Parliamentary enactments.

Accordingly, identical "concurrent" legislation was prepared and passed, the Dominion enactment being entitled "The Lake of the Woods Control Board Act, 1921" and the Ontario enactment being entitled "The Lake of the Woods Control Board Act, 1922." These two acts conveyed to the Board the combined authority of the Dominion and Province.

Owing to legislative difficulties developing at the time, the above legislation (which has been generally referred to as the "concurrent" legislation) was held in abeyance for the time being and the Dominion Lake of the Woods Regulation Act, 1921, was passed by the Dominion Parliament. Section 2 declared that "all dams, structures and other works of whatsoever description which have heretofore been or may hereafter be constructed in, upon, over, about or across any outlet of the Lake of the Woods. . . . which do or may or can in any wise control, regulate or affect the outflow of water from the said lake . . . are and each of them is declared to be for the general advantage of Canada."

Note.—The significance of this declaration is found in Section 92 (10) of the British North America Act, 1867, which provides that works declared by the Dominion Parliament to be for the "General Advantage of Canada," are subject to the exclusive legislative authority of the Parliament of Canada.

Section 3 provided for the regulation "and control of the outflow of the waters of the Lake of the Woods so as

to maintain the level of the said lake between the elevations recommended by the report of the International Joint Commission of June 12, 1917, or between such elevations as may be agreed upon by the United States and Canada, and so that the obligations, relating to the level of the Lake of the Woods, of Canada, or of any of the Provinces of Canada, as part of the British Dominions beyond the seas, towards the United States, arising out of treaty made or to be made between His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas, Emperor of India, and the United States, may be duly performed."

(A certified copy of the Lake of the Woods Regulation Act, 1921 (Dominion) forms part of the record as Exhibit No. 64. R. 240.)

Under the authority of the Lake of the Woods Regulation Act, 1921 (Dominion), the Dominion Order in Council, dated September 21, 1921, provided that "the four members of the original Board be reappointed in their present capacities" and reiterated the requirement that the Board should regulate the lake in the interests of navigation, power and other interests, and charged the Board with the responsibility of "the administration and enforcing of the provisions of the Lake of the Woods Regulation Act."

(A certified copy of the Dominion Order in Council dated September 21, 1921, forms part of the record as Exhibit No. 64. R. 242.)

The Lake of the Woods Control Board, as reappointed under this Order in Council, continued to exercise complete control over the levels of and the outflow from the lake under the above enactment until 1928.

In the year 1928, the Dominion and the Province of Ontario with the concurrence of the Province of Manitoba entered into an agreement for the creation of storage in Lac Seul, for the simultaneous repeal of the Lake of the Woods Regulation Act, 1921 (Dominion) and the bringing into force in the place thereof of the Lake of the Woods Control Board Act, 1921 (Dominion) and the Lake of the Woods Control Board Act, 1922 (Ontario), i.e., the " concurrent " legislation referred to in the foregoing.

The Lac Seul Conservation Act, 1928, was accordingly passed by the Dominion Government, Section 3 of which provided that " the Lake of the Woods Regulation Act, 1921, Chapter 28 of the Statutes of 1921 is repealed."

(A certified copy of the Lac Seul Conservation Act forms part of the record as Exhibit No. 64. R. 243.)

(A certified copy of the Proclamation of the Governor in Council, dated June 20, 1928, bringing into effect on the 30th of June, 1928, the Lake of the Woods Control Board Act, 1921, forms part of the record as Exhibit No. 64. R. 243.)

(Certified copies of the Dominion and Ontario Lake of the Woods Control Board Acts of 1921 and 1922 form part of the record as Exhibit No. 64. R. 238-240.)

Under the " concurrent " legislation, it became necessary to reappoint the Lake of the Woods Control Board under the new enactments.

Accordingly, by Orders in Council the members of the Board were reappointed.

(A certified copy of Dominion Order in Council dated June 20, 1928, forms part of the record as Exhibit No. 64. R. 243.)

(A certified copy of Ontario Order in Council, dated June 27, 1928, reappointing the two Ontario members of the Lake of the Woods Control Board, forms part of the record as Exhibit No. 64. R. 244.)

The foregoing series of Dominion and Provincial enactments establishes the fact that the structures controlling the lake outlets, together with the regulation of the lake levels and the outflow from the lake, have been under the direct control of the two Governments since 1919.

Supplementing the above enactments providing for Governmental control of the lake was the Lake of the Woods Convention of the 24th February, 1925, wherein it was provided that "The Government of Canada shall establish and maintain a Canadian Lake of the Woods Control Board . . . which shall regulate and control the outflow of the waters of the Lake of the Woods," and also that "There shall be established and maintained an International Lake of the Woods Control Board composed of two engineers, one appointed by the Government of Canada anad one by the Government of the United States . . . and whenever the level of the lake rises above elevation 1061, sea-level datum, or falls below elevation 1056, sea-level datum, the rate of total discharge of water from the lake shall be subject to the approval of this Board."

On February 24, 1925, therefore, the strictly Canadian Governmental regulation and control of the lake by the Lake of the Woods Control Board as at that time established, was supplemented by a Treaty which confirmed the control by the Canadian Lake of the Woods Control Board and superimposed an International Board responsible for the approval of the rate of total discharge of water from the lake when the lake rises above elevation 1061 or falls below elevation 1056. (Lake of Woods

Convention, United States Statutes at Large, 69th Congress, 1925-1927, Vol. 44, Pt. 3, Page 2108 et seq.; R. 244.).

Summarizing the foregoing, it is established:

1. That the regulation of the lake was undertaken by the Government of Ontario in June, 1898, and this control was exercised for the purpose of improving navigation on the said lake.
2. That by agreement between the Dominion and the Province of Ontario, expressed by Orders in Council issued by both Governments, the regulation of the lake was in 1919 placed under the Lake of the Woods Control Board, with instructions to regulate the lake in the interests of navigation, water-power and other interests, both on the lake and in the Winnipeg River.
3. That the jurisdiction of the Lake of the Woods Control Board was further established by legislation on the part of the Dominion Government entitled "the Lake of the Woods Regulation Act, 1921" and by "concurrent" legislation named the Lake of the Woods Control Board Act, 1921 (Dominion) and the Lake of the Woods Control Board Act, 1922 (Ontario),—these enactments being brought into effect in 1928 upon the repeal of the Dominion Lake of the Woods Regulation Act, 1921.
4. That the above legislation provided for the regulation of the lake in accordance with the recommendations of the International Joint Commission in its Final Report and in accordance with such elevations as might be agreed upon by treaty with the United States.
5. That this regulation also provided for the protection of domestic and sanitary interests, naviga-

tion and transportation interests, fishing interests, and power and irrigation interests.

6. That the above enactments provided ample powers to ensure the enforcement of the regulation by the Board.
7. That the Lake of the Woods Convention superimposed upon the above Canadian Governmental control, a Treaty commitment defining the jurisdiction of the Canadian Board and of a new International Board, and prescribing a regulation to be exercised to secure the most advantageous use of the waters in accord with the recommendations of the International Joint Commission.

In view of the foregoing considerations, it is submitted,—

That it would have been wholly impracticable for private power interests at any time since 1898 (some 8 years before the first power plant came into operation on the Winnipeg River) to have secured control over the outlets from the lake for the purpose of using the lake as a power storage reservoir, and

That, without securing such control it would have been completely out of the question for these power interests to have attempted to secure flowage easements along the shore of the lake, even assuming that such an arrangement would have been practicable from other angles.

It follows that the U.S. District Court was right in holding that the possibility of using the Lake of the Woods as a storage reservoir could not as a matter of law enhance the value of shore lands; for, manifestly, such storage possibilities would not, in the face of government control of the outlets, have brought any bidder into the market.

As a supplement to the contentions made in the argument presented under this heading and as indicating further how drastically the Dominion Government insisted upon retaining control over the lake outlets, reference might be made to the agreement entered into between His Majesty the King represented by the Minister of the Interior of the Dominion Government, and the Keewatin Power Company, dated December 11, 1924, covering the reconstruction of the Norman Dam, the construction of the power station located in and forming part of the dam, and the enlargement of the Western Outlet, all by the Keewatin Power Company in accordance with plans approved by the Dominion Government and with the Dominion Government contributing towards the cost of the outlets enlargement and of the reconstruction of the control dam.

The Government insisted upon control of the works either by the Control Board or by an officer of the Department and incorporated ample provisions for enforcing such control.

It will be noted that the Dominion Government—not content with the sanctions embodied in the Lake of the Woods Control Board Acts, 1921 and 1922 ("concurrent" legislation)—further embodied in the agreement entered into with the Keewatin Power Company for the actual enlargement of the Western Outlet and for the reconstruction of the Norman Control Dam, the following express conditions:—

1. That the Minister shall by means of the Lake of the Woods Control Board or by any officer of the Department of the Interior, at all times in the future control and operate the works as defined (i.e., both the control dam and the power house) for the purpose of securing to the public the most dependable flow and the most advantageous use

of the waters of the Winnipeg River, and of the Lake of the Woods.

2. That the control by the Minister shall be exclusive and that the company's rights to use water for the development of power and to use the works and the power house shall be subject to the right of the Minister to control the flow for the purposes aforesaid.
3. That the Minister is granted, for the purposes of control, a licence and easement for access to the lands and premises upon which the works are located.

It might be added that by a supplementary agreement between His Majesty and the Keewatin Power Company, also dated December 11, 1924, exactly similar provisions were agreed upon governing the control of the company's power plant in the Eastern Outlet and of the flow of the water through the same.

It is apparent therefore that in these agreements relating to the two structures controlling the outflow through the Western and Eastern Outlets of the lake respectively the use of water for power purposes was completely subordinated to the maintenance of a regulated flow " designed for securing to the public the most dependable flow and most advantageous use of the waters of the Winnipeg River."

(A certified copy of the Agreement between His Majesty and the Keewatin Power Company dated 11th December, 1924, covering the Western Outlet forms part of the record as Exhibit No. 65.

A certified copy of the Agreement between His Majesty and the Keewatin Power Company, dated 11th December, 1924, covering the Eastern Outlet forms part of the record as Exhibit No. 65. Pertinent Extracts are to be found in the Record, R. 245-248.)

H.

International commitments made independent action by private interests impossible.

Private interests could not, from the date of the execution of the Boundary Waters Treaty in 1909, have secured control of the regulation of the lake for any private interest whatsoever, whether for power, fishing, lumbering, irrigation, drainage, water supply or sanitary purposes, or even for the protection of foreshore properties, because of international commitments between the two countries.

The record of international restriction on the Lake of the Woods follows:—

The Boundary Waters Treaty, 1909, between the United States of America and His Majesty, provided in the preliminary article that, "boundary waters are defined as the waters from main shore to main shore of the lakes . . along which the International Boundary between the United States and the Dominion of Canada passes . . ." The waters of the Lake of the Woods are, therefore, "boundary waters," within this definition of the Treaty.

Article III of the Treaty provides that no further or other uses or obstructions . . of boundary waters on either side of the line affecting the natural level or flow of boundary waters on the other side of the line shall be made except:—

(1) By Special Agreement between the High Contracting Parties, or

(2) By authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval of the International Joint Commission established by the Treaty.

It is apparent from this article that no private interests could, after 1909, interfere with the levels of the Lake of the Woods.

Furthermore, Article VIII provides that,—"The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:

(1) Uses for domestic and sanitary purposes;

(2) Uses for navigation, including the service of canals for the purposes of navigation;

(3) Uses for power and for irrigation purposes."

It will be noted from the foregoing provision that the uses of water for domestic and sanitary purposes and for navigation purposes are given precedence over the use of water for power purposes. *This provision emphasizes the impossibility of the power interests alone securing control over the regulation of the lake for power purposes. Even the Governments in undertaking the regulation of the lake are compelled, by their mutual commitments, to place power interests fourth in order of precedence.*

Article IX of the Treaty provides that "The High Contracting Parties further agree that any other questions or matters of difference arising between them ... along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time, to the International Joint Commission for examination and report whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred." (The Boundary Waters Treaty—United States Statutes at Large, 61st Congress, 1909-1911, Vol. 36, Pt. 2, Page 2448; R. 256-257; Appendix A, infra p. 103).

Furthermore, supplementing the Treaty, the Parliament of Canada enacted that "The laws of Canada and of the several Provinces thereof are hereby amended and altered so as to permit, authorize, and sanction the performance of the obligations undertaken by His Majesty in and under the said treaty; and so as to sanction, confer and impose the various rights, duties and disabilities intended by the said treaty to be conferred or imposed or to exist within Canada."

It is therefore, apparent that Canada was explicitly bound by the restrictions imposed upon the Lake of the Woods as a "boundary water" by the Boundary Waters Treaty.

(A certified copy of the Act above referred to, relating to the establishment of the International Joint Commission forms part of the record as Exhibit No. 68. R. 258.)

Following the ratification of the Boundary Waters Treaty and in conformity with the provisions of Article IX thereof, the Governments of the United States and of the Dominion of Canada, by identical letters of reference, referred to the International Joint Commission for examination and report, the question of securing "the most advantageous use of the waters of the Lake of the Woods and of the waters flowing into and from the lake on each side of the boundary for domestic and sanitary purposes, for navigation and transportation purposes, for fishing purposes, and for power and irrigation purposes, and also in order to secure the most advantageous use of the shores and harbours of the lake and of the waters flowing into and from the lake. . ." R. 258, 259.)

It will be noted that the two Governments requested a report upon the most advantageous use of the waters of the lake for all purposes—not for power purposes alone.

The Commission in the course of its examination into the problem held Public Hearings as follows:—

At International Falls, Minnesota, on September 17, 1912.

At Warroad, Minnesota, on September 18, 1912.

At Kenora, Ontario, on September 20, 1912.

At Warroad, Minnesota, on September 7, 8, 9, 1915.

At International Falls, Minnesota, on September 10, 1915.

At Kenora, Ontario, on September 13, 14, 1915.

At International Falls, Minnesota, on January 28, 29, 1916.

At Winnipeg, Manitoba, on February 1, 2, 3, 4, 1916, and

At Washington, D.C. (Final Argument) on April 4, 5, 6, 8, 1916.

It will be noted that eight public hearings were held during a period extending from September, 1912, to February, 1916, plus a hearing at which final argument was presented in Washington in April, 1916. The eight public hearings were held in the district affected—three at International Falls, Minnesota, two at Warroad, Minnesota, two at Kenora, Ontario, and one at Winnipeg, Manitoba. These were advertised in advance and the various interests affected were directly notified and every opportunity given for the appearance before the Commission of all who had an interest in the lake levels.

A review of the Commission's hearings will indicate that full advantage was taken of these hearings by all parties concerned, including those interested in the foreshore properties which are now before this Court for condemnation.

It is also brought to the attention of the Court that the number of hearings and the extent and character and conflict of the representations made to the Com-

mission at these hearings by the various navigation, power, fishing, lumbering, foreshore and other interests concerned, is striking evidence of the complexity of the problem and the impracticability of private power interests attempting to secure on their own initiative a right to store water in the lake and to regulate the same for power purposes.

(A copy of the Final Report of the International Joint Commission forms part of the Record as Exhibit No. 71, page 13, v. R. 278.)

Following the hearings and final argument, the International Joint Commission issued a Final Report, dated May 18, 1917, and submitted to the two Governments on June 12, 1917, setting forth definite recommendations as to the regulation of the lake level and as to the outflow from the lake.

Following the receipt and consideration of the Final Report of the International Joint Commission, the principles embodied in the recommendations of the Commission were accepted by the two Governments, by an exchange of notes, early in 1919.

(Certified copies of the above exchanges between the two Governments form part of the record as Exhibit No. 68, v. R. 258.)

By the Lake of the Woods Convention signed on February 24, 1925, between His Majesty on behalf of Canada, and the United States, the two Governments accepted " as a basis of agreement the recommendations made by the International Joint Commission in its Final Report dated May 18, 1917, on the Reference concerning the Lake of the Woods," and agreed to the regulation of the lake within the limits set forth therein. (Lake of the Woods Convention, United States Statutes at Large, 69th Congress, 1925-1927, Vol. 44, Pt. 3, Page 2108 et seq.)

From the foregoing it is established:

1. That no interference with the levels of the Lake of the Woods has been possible since the ratification of the Boundary Waters Treaty in 1909, except by a Special Agreement on the part of the Governments of Canada and the United States or with the approval of the International Joint Commission.
2. That the two Governments committed themselves in the Boundary Waters Treaty to an order of precedence which should be thereafter observed as amongst the various uses for which these waters might be applied and that this order of precedence placed domestic, sanitary and navigation uses ahead of uses for power purposes.
3. That the two Governments, realizing the complexity of the problem and of the interests at stake, took action under Article IX of the Treaty and referred the whole problem of securing the most advantageous use of the waters of the Lake of the Woods and of the waters flowing into and from the lake on each side of the boundary for domestic, sanitary, navigation, transportation, fishing, power and irrigation purposes, to the International Joint Commission for examination and report.
4. That following extensive public hearings at which all interests concerned in or affected by the lake levels, had the opportunity of being heard and at which all such interests were heard, the Commission agreed upon certain recommendations and included the same in a final report submitted to the two Governments.
5. That by an interchange of correspondence the two Governments, in April, 1919, agreed to the prin-

ciples of the recommendations contained in the Commission's Final Report.

6. That this agreement was finally embodied in the Lake of the Woods Convention signed on February 24, 1925, which accepted " as a basis of agreement the recommendations made by the International Joint Commission in its final report dated May 18, 1917, on the reference concerning the Lake of the Woods," and provided for the regulation of the lake within the limits set forth therein which govern these proceedings.

In view of the above mentioned International Commitments by the Governments concerned, it is submitted:

1. That it was impossible for any private interest independently to have secured control of the regulation of the lake for any purpose which would have interfered with the lake levels at any time subsequent to the Boundary Waters Treaty, 1909.
2. That it would have been impossible for private power interests on the Winnipeg River or elsewhere to have secured control of the regulation of the lake for power purposes in view of the navigation and other interests which were involved and which, under the order of precedence established by the Treaty, would necessarily require the consideration and protection of both governments.
3. That any Governmental action taken in conformity with the Boundary Waters Treaty was inevitably a slow and tedious process because of the complexity of the problem and the conflicting claims and requirements of the various interests affected by the lake level.

4. That the Governments concerned realized the impossibility of any single interest, such as navigation or power taking steps to secure a fixed level or storage range on the lake and took it upon themselves to settle the matter on behalf of all interests by a joint government reference, to the International Joint Commission, under Article IX of the Boundary Waters Treaty.

5. That the existence of the joint governmental reference in respect to the Lake of the Woods, made it obviously impracticable for any private enterprise to submit an application to the International Joint Commission, under Articles III, IV, and VIII of the Boundary Waters Treaty. (This point is of particular importance in considering the offers of proof Nos. 73 and 74, R. 78.)

6. That International Treaty commitments made it impossible for private interests to secure the right to regulate the lake as a storage reservoir in the interests of power.

I.

Impracticability of securing concurrence of all interested parties to level control by any other agency than the Governments pursuant to treaty.

The differing requirements of the various interests concerned in the lake levels, including those of navigation, fishing, lumbering, domestic water supply, power, and of foreshore property holders, made it impracticable for private power interests on the Winnipeg River in Manitoba to have arranged for a co-ordination of these diverse interests for the benefit of power alone on the Winnipeg River in Manitoba.

In the identical letters of reference on behalf of the Governments of the United States and of Canada, dated June 27, 1912, and addressed to the International Joint Commission, the Commission was requested to examine and report to the two Governments "upon the effects and circumstances of the practical questions and matters referred together with such conclusions and recommendations as may be appropriate." The first question so referred is quoted as follows:—

> "(1) In order to secure the most advantageous use of the waters of the Lake of the Woods and of the waters flowing into and from the lake on each side of the boundary for domestic and sanitary purposes, for navigation and transportation purposes, for fishing purposes, and for power and irrigation purposes, and also in order to secure the most advantageous use of the shores and harbours of the lake and of the waters flowing into and from the lake, is it practicable and desirable to maintain the surface of the lake during the different seasons of the year at a certain stated level, and if so at what level?

The importance of the various interests dependent upon the lake for domestic and sanitary purposes, for navigation and transportation purposes, for fishing purposes, and for power and irrigation purposes was thus definitely recognized by the two governments concerned as early as 1912, and to such an extent that they were specifically brought to the attention of the International Joint Commission in order that each might receive proper consideration in the determination of the most advantageous use of the waters of the lake and of the waters flowing into and from the lake on each side of the boundary.

Full opportunity was given to these diverse interests to appear before the Commission and present their respective views and requirements in the various hearings held by the Commission. (Supra, p. 68.)

It will be noted that the first question referred to the International Joint Commission as quoted above contemplates maintaining the surface of the lake at a fixed level. But the Commission in the course of its investigations found that this could not be done. In its Final Report, dated May 18, 1917, the reason is made clear:—

Page 26 of the Final Report states:—

"In view of the great variations in precipitation occurring from year to year, the maintenance of an absolutely uniform level of the Lake of the Woods, over long periods of time, is not practicable, nor is it desirable, because it would not admit of the most advantageous use of the waters flowing into and from that lake."

As a result of the physical conditions affecting lake levels and to secure the most advantageous use of the waters for all purposes, the Commission recommended a definite range of levels and not one fixed level.

The extreme conflict between what would best meet the requirements of the various interests concerned is exhaustively established in the Final Report of the Commission, and is shown by the following extracts:—

Riparian Lands.

Page 41 of the Final Report states: "The most desirable level for the agricultural interests around the Lake of the Woods is a low level."

Navigation.

Page 42 of the Final Report states:—"The effect of various levels on the navigation and summer-resort interests, in the vicinity of Kenora, is in a large measure determined by the depths in the various navigation channels and harbours of the lake, by the available depths of water leading to the boathouses, and by the elevation of the boathouse floors and the tops of docks . . . It appears from these curves that the tops of all docks in the vicinity of Kenora and Keewatin are at or above an elevation of 1,061 sea level datum, and that the boathouse floors are all above an elevation of 1,059·5,

over 90 per cent of them being above 1,061. Only about 50 per cent of both docks and boathouse floors, however, are above elevation 1,062."

Page 43 of the Final Report states:—"Low stages, that is, stages below about 1,058, will also require additional dredging in harbours and navigation channels in various portions of the lake."

Page 43 of the Final Report also states:—"At the public hearings, 1916, Mr. W. J. Stewart, Chief Hydrographer, speaking for the Dominion Government, stated that an occasional low level of 1,056 could be accepted and that an ordinary level of 1,060·5 would be desirable for the navigation interests, but that 1,061·0 was not objectionable, except in so far as it might make it difficult to prevent the lake from exceeding 1,062·5 in seasons of extreme flood."

Page 44 of the Final Report states:—"Major E. D. Peck, in charge of navigation improvements on the United States side of the lake, stated that a range of levels between 4 and 7 feet on the Warroad gauge, or 1,057·6 to 1,060·6 was satisfactory to his Government."

Navigation below Outlets.

Page 44 of the Final Report states:—"Navigation interests on the Winnipeg River between Kenora and Minaki are affected by fluctuations in the outflow from the lake. In view of the fact that at low water there is less fall and hence less current at The Dalles, than at high water, moderately low rates of outflow from the Lake of the Woods are more favourable for navigation on that portion of the Winnipeg River than high rates. Very low rates of discharge, however, are unfavourable to navigation of the river immediately below the outlets of the lake. It follows then that any regulation of levels and outflow which results in either very low or very high rates of outflow from the lake is detrimental to the navigation interests on the Winnipeg River below the outlets of the lake."

Lumbering Interests.

Page 43 of the Final Report states:—"The lumbering interests are affected by the levels of the Lake of the

Woods mainly in so far as the stage of the lake has a bearing on the facility with which logs can be taken out of the various bays and inlets, and then towed across the lake and hoisted into the mills by means of jack ladders. In low water the towing channels become narrower and more difficult of navigation with log booms, through the protrudence of reefs above the water surface. The cost of handling logs in the log ponds of the mills is also increased."

Summer Resort Interests.

Page 44 of the Final Report states:—"Mr. Thomas R. Deacon, speaking for the summer resort interests, stated that a range of levels between 1,061 and 1.058 would be satisfactory to these interests."

Fishing Interests.

Page 45 of the Final Report states:—"The most desirable level for the fishing interests is a fairly uniform level. The testimony of Mr. Paul Marschalk, representing the United States fishermen, Mr. Arthur Johnson, representing the Canadian fishermen, and Prof. Edward E. Prince, Dominion Commissioner of Fisheries, is in full accord in this respect. A large and rapid drop in stage in a single season is particularly undesirable. The proposed regulation successfully prevents this."

Domestic and Sanitary Interests.

Page 46 of the Final Report states in discussing the Winnipeg aqueduct:—"The interests of the City of Winnipeg would be served by a high level. Shoal Lake, however, may be maintained at any desirable level by the construction of a dam at the outlet of Ash Rapids, or water can be pumped into the aqueduct in case of low stages in the future."

Page 46 of the Final Report also states:—"The interests of the town of Warroad in the use of the waters of the Lake of the Woods for domestic and sanitary purposes would appear to be primarily the use of that body of water for the purposes of drainage and of sewage disposal. As the general elevation of the ground upon which the town of Warroad is built is only between 1,066 and 1,068, sea level datum, it is evident that the outlet of a gravity discharge

system of sewerage could not possibly be placed above even ordinary high water in a state of nature without raising the house connections of the sewers above the bottom of the cellars and above the frost line. Even under the natural regimen of lake levels, then, it would have been necessary for the town of Warroad to install some form of sewage lift for use during high water."

Water-power at Outlets of Lake.

Page 46 of the Final Report states:—"The fall at the outlet of the Lake of the Woods varies both with lake level and with outflow. An increase in lake stage produces a corresponding increase in fall. The available head, however, varies inversely as the outflow—that is, the greater the outflow the less the head, because of the rise in tail-water level, which accompanies increased outflow. The most desirable condition for the water-powers at the outlets of the lake would be to have both a high uniform level and a uniform outflow. It being impossible, as stated before, to obtain both of these results at the same time, the most advantageous conditions can only be determined by weighing the advantages and disadvantages resulting from different systems of regulation."

Navigation and Power Interests on Lower Rainy River.

Page 48 of the Final Report states:—"High levels on the Lake of the Woods and moderately high rates of discharge in Rainy River both tend to improve navigation through the Long Sault Rapids. Only the construction of a dam at the Long Sault, however, will improve navigation through the Manitou Rapids. The fall at the latter rapids increases with increasing stage, making them dangerous to navigation at high water."

Summarization of Effects of Levels on Various Interests.

On Page 49, the Final Report summarizes as follows:—

"In the preceding pages the kind of regulation favourable to the several interests using the waters of the Lake of the Woods and its shores and harbours has been briefly discussed. Evidently there is considerable conflict between the requirements

of these interests. On the one hand are the navigation, fishing, and summer resort interests, which desire regulation to secure a uniform level, and on the other are the water-power interests on the Winnipeg River, which desire regulation to secure uniform outflow, necessitating the largest practicable fluctuation in level. The riparian owners desire a low level and the water-powers at the outlets a high level. In endeavouring to reconcile these differences, so far as practicable, the commission has taken a position between these extremes and recommends a regulation which will subserve all interests reasonably well and which, so far as appears practicable, will admit of the most advantageous use of these waters."

Page 6 of the Final Report summarizes as follows:—

"The principal interests affected by increasing the ordinary maximum level are the riparian owners, including the town of Warroad, and the fishing interests in the United States portion of the lake and the summer resorts in the Canadian portion of the lake. The principal interests affected by reducing the minimum level are the water-power plants and lumbering interests at the outlets and the navigation interests in both countries. The interests most affected by a range in levels are the fishing interests. In endeavouring to arrive at the most desirable level for the Lake of the Woods, and the extent to which it is practicable and desirable to equalize the outflow by permitting a draft on stored water, the commission found it extremely difficult to evaluate the injurious effect of high levels on fishing in the Big Traverse, of low levels on the navigation interests, and of fluctuations in level on the fishing interests in both countries. The ordinary maximum level and the system of regulation here recommended, it is believed, come as near as is practicable to securing the most advantageous use of these waters by all interests concerned."

(A certified copy of the Final Report of the International Joint Commission, dated May 18, 1917, has already been submitted to the Court as Exhibit No. 71, R. 278.)

Water-power Interests on Winnipeg River.

A consideration of the Final Report, as a whole, without reference to any particular citation, establishes that the interests of water-power on the Winnipeg River are best served by securing a storage range upon the lake, within the limits of which water can be drawn upon, with a view to increasing the flow of the water in the river during periods of low run-off.

The Reference to the International Joint Commission culminated in the Convention and Protocol which were concluded on February 24, 1925, for regulating the level of the Lake of the Woods and the outflow therefrom. (United States Statutes at Large, 69th Congress, 1925-1927, Vol. 44, Pt. 3, Page 2108 et seq. R. 258.)

The preamble to the Convention states as follows:—

"Desiring to regulate the level of the Lake of the Woods in order to secure to the inhabitants of Canada and the United States the most advantageous use of the waters thereof and of the waters flowing into and from the lake on each side of the boundary between the two countries; and

"Accepting as a basis of agreement, the recommendations made by the International Joint Commission in its final report of May 18, 1917, on the Reference concerning Lake of the Woods submitted to it by the Governments of Canada and the United States of America."

Article 2 of the Convention provides as follows:—

"The level of Lake of the Woods shall be regulated to the extent and in the manner provided for in the present Convention, with the object of securing to the inhabitants of Canada and the United States the most advantageous use of the waters thereof and of the waters flowing into and from the lake on each side of the boundary between the two countries for domestic and sanitary purposes, for navigation purposes, for fishing purposes, and for power, irrigation and reclamation purposes."

Attention is drawn to the fact that Article 2 is the paramount or governing article of the Convention. Article 1 simply defines certain of the terms used in the

Convention. Article 2 sets forth the basic objective of the Convention and the basic agreement between the two governments. The remaining articles of the Convention, as well as the Protocol in its entirety, cover the provisions which are necessary to give effect to Article 2.

To summarize the foregoing, it has been established:—

1. That, as early as 1912, at the time the Lake of the Woods question was referred to the International Joint Commission by the two Governments for examination and report, the importance and variety of the different interests dependent upon the lake and the flow into and from the lake was clearly recognized and was brought particularly to the attention of the Commission in its consideration of the problem.
2. That there is a very great conflict between the various interests concerned in the lake levels as to what level or range of levels would best meet their different individual requirements.
3. That in the Lake of the Woods Convention signed on February 24, 1925—the culmination of the international consideration of this problem—the paramount or governing article specifically provides for a regulation of the lake so as to secure the most advantageous use of the waters of the lake, and of the waters flowing into and from the lake, for the various interests as a whole dependent upon the same.

The fact that there were these various interests established in the vicinity of, and dependent upon, the waters of the lake and upon waters flowing into and out of the lake, and that these interests were of such a varying character and differed so radically in respect to the levels

and outflow that would best meet their respective needs made it impossible for private power interests on the Winnipeg River in Manitoba to have successfully negotiated with, and arranged for the co-operation of, these diverse interests and for the acceptance by them of a range of levels which would meet the requirements of the power interests for the regulation of the lake for power purposes.

The only agency which could effectively co-ordinate the viewpoint of these conflicting interests was a governmental agency,—and in view of the lake being a boundary water within the definition of the Boundary Waters Treaty, 1909,—the only possible means of co-ordinating the interests on both sides of the line was by the two Governments acting in conformity with the provisions agreed upon in the said Boundary Waters Treaty, implemented by a further international Treaty or Convention such as that actually made in the Lake of the Woods Convention.

J.

Conclusions.

In view of the foregoing obstacles that must be surmounted by the petitioners, or by any private enterprise purchasing flowage easements from the petitioners, before a reservoir could be established, it is clear that the physical adaptability of the petitioners' lands for reservoir use could not possibly be an element of value for which they could be compensated. At the date of the condemnation, the possibility that a purchaser might be found, willing to pay for the interest taken on the basis of special adaptability to flowage for power purposes, was a possibility too remote to be an element in the determination of their then market value.

3. The fact of flowage prior to condemnation is irrelevant to a determination of the compensation to which the owners are entitled in this proceeding.

The preceding sections of the argument have proceeded from the theory that past flowage should be eliminated from consideration in assessing compensation upon the acquisition of the flowage easements in the present proceedings.

It has been contended throughout this case that the use which the property has served during the past thirty years, and was serving at the time of the condemnation, should be considered by the jury in determining just compensation. The use alleged is the use as part of a valuable storage reservoir used in the development of hydro-electric power and other purposes.

It has been pointed out that the regulation and control of the levels of the Lake of the Woods for the period of thirty years, had been a regulation in the interest of navigation, the benefits to power being merely incidental (supra pp. 7-9). This point is, however, not of primary importance, because, whether or not the past regulation was a regulation in the interest of power, it would not justify compensation to the petitioners, on the basis of special adaptability of their lands for reservoir purposes.

At first impression, it would seem to be fair that the petitioner should be compensated on the basis of the actual use to which his property had been put for the past thirty years. It is necessary, however, to examine the nature of this use and it will appear that it was not a use available to the petitioner, and it was not a use capable of affecting market values.

It is submitted that, under the law of eminent domain, the petitioner is only entitled to be compensated where

he has lost something of value to himself. The United States Government, in condemning the petitioners' flowage easements, has not deprived them of any element of value to the petitioners in so far as the alleged use is concerned. The artificial regulation of the lake during the thirty-year period preceding the condemnation, had not been, and could not be, of any value to the petitioners. They were not using the lands for reservoir purposes themselves and it is not claimed that the lands could have had any use value save in conjunction with all the other riparian lands. They could not sell their flowage rights to any private enterprise. The possible purchaser, at any time preceding the taking, would have faced the same series of obstacles that are enumerated in the nine headings under the preceding section of the argument. The possibility that a purchaser might be found, willing to pay for flowage rights over the petitioners' lands, on the basis of special adaptability to flowage or power purposes, was too remote to be an element in determining their market value prior to the date of the Lake of the Woods Convention, 1925.

The mere physical adaptability of petitioners' lands for reservoir purposes, or even the physical existence of an actual reservoir, could not be an element in value to the petitioners or to any possible purchasers. Assuming the existence of a reservoir, it could only be valuable to the power interests or to any other private enterprise if they could have the legal right to regulate the levels in the interests of power and the legal right to continued existence of the reservoir and continued privilege of regulation. No private interest would invest capital in the acquisition of flowage rights from the petitioners or any other landowners, unless there was some practicable way in which they could insure the continued existence of the reservoir and a permanent right to regulate and

control the levels in the interests of water-power development.

There could not be a purchaser for the petitioners' flowage rights, because it was impossible for any person or any private interest to acquire the legal right to maintain a storage reservoir on the Lake of the Woods. The offers of proof included proffered testimony by Mr. Meyer, with a view to establishing that there was conflict and competition between Ontario and Manitoba interests. It may be conceded that there was a conflict in interest between authorities and corporations in Ontario and in Manitoba in respect to the regulation and control of the Lake of the Woods. If it had been legally possible for either of these competing groups to acquire and establish a power reservoir on the Lake of the Woods, it might have been theoretically feasible for either group to acquire flowage easements on the United States foreshore, provided that a practicable scheme for uniting the almost innumerable land titles, and controlling the outlets, could have been devised. The obstacles to establishing such a reservoir have been set forth in the preceding section of the argument.

The only element of value to the petitioners, arising from the past user of their lands, is the possible existence of a right to redress against the Canadian agencies which had regulated the levels of the lake during the period under discussion. The question of whether such a right to redress existed will be considered in the following section of the argument. Even if such a right to redress existed, it could not be taken into account in evaluating compensation for the taking of the flowage easement. The petitioners are being paid for past damages in a separate proceeding. They will be compensated for all future damages to their lands upon payment of the amounts awarded by the verdicts of the jury and the

judgment of the District Court. To bring into account in the present proceedings the deprivation of a possible right to redress against the Canadian agencies in question, would be to cause the landowners to be paid twice for the same injury. This result, obviously, could not have been intended by the Lake of the Woods Convention and the enabling legislation.

Consequently, as the petitioners could not use their lands for reservoir purposes and could not receive any profit from the alleged use during the thirty-year period, and as there could not be any interests competing for the acquisition of flowage easements, and in view of the legal and practical impossibility of any person getting in the title and establishing a reservoir, it is submitted that the alleged use cannot be relied upon as a basis for compensation.

4. The landowners, prior to the Lake of the Woods Convention (1925) had no right to redress for flowage and the judgment appealed from, to the extent that it is based on this proposition, is not inconsistent either with that Convention or with the prior Boundary Waters Treaty of 1909.

It has been contended that by the Boundary Waters Treaty, 1909, or under the general law, the flooding of lands in Minnesota caused by interference with the outflow of the lake in Canada, gave to the owners of such lands rights and remedies for redress on account of such flooding (Petition and Brief in Certiorari, p. 2). The Circuit Court of Appeals in the majority opinion took the view that the owners did not have a right to compensation from the Canadian agencies which were responsible for the flooding. (R. 426-427). It has been contended that such a finding was a construction of the Boundary Waters Treaty, 1909, in a manner prejudicial to the rights of American property owners and contrary to the

terms of the Treaty and likely to cause international misunderstanding. (Petition and Brief in Certiorari, p. 9). It has also been contended that the decision was probably contrary to the spirit of the provisions of the Treaty of 1925 (the Lake of the Woods Convention, 1925) and the Acts of Congress giving effect thereto. (Ibid, p. 11-12)*

A.

Whether the landowners had a right to redress for past flooding.

The views of the petitioners in this matter are supported by the dissenting opinion of Booth, Circuit Judge, in which the following statement is made:—

> "(3) Nor was the situation of the landowner as to recovery of such flowage use value as damages from the trespassers one of mere hopeless speculation. Were this the case, it would be a reproach to both Governments concerned. On the contrary, it is, in my opinion, a reasonable and safe conclusion that once the facts were established, the landowner could get compensation in damages in the courts of Canada, if the trespass had been committed by private parties; and probably could obtain compensation by Petition of Right, if the flowage use had been taken by authority of the Canadian Government (See Halsbury's Laws of England, Vol. 1, p. 17, paragraphs 21, 22, 23 and 24; and Vol. 10, pp. 26-30; also Vol. 2 D.L.R. (1928), p. 625, annotation "Petition of Right" by Arthur S. Bourinot); and certainly he could obtain redress through diplomatic action between the two Governments.
>
> "Such, substantially, was the situation, in my judgment, when the present condemnation proceedings were brought." (R. 433.)

In approaching the question of the existence of a right to redress in the Canadian Courts, it may be observed that this is a question of foreign law and should have been raised and proved by competent evidence at

* These matters are also dealt with in the petitioners' brief in the present proceedings, pages 43-47, 117.

the trial. The petitioners seek to base their claims upon the past user of their lands. It is an integral part of the petitioners' case that this past user was an element of value to them for which they should be compensated, and they seek to establish that the user in question was valuable, rather than detrimental, by asserting that they had available to them rights of redress in the Canadian Courts against the agencies which had regulated the levels of the lake in the past. The existence of a right to redress is, therefore, an integral part of the petitioners' case, and the burden is upon the petitioners to establish that such a right existed.

It is submitted, with the utmost deference, that the existence of a right of action in the Canadian Courts, under the Canadian law, cannot properly be proved, either by its assertion or by the statement of the learned Circuit Judge in his dissenting opinion.

The learned judges who delivered the majority opinion were clearly right, in the absence of any competent evidence of the existence of a right to redress, in taking the view that the landowners had no hope of redress for the alleged trespass to their lands. Upon this view, the alleged trespassory use was a reducer of value, rather than an element of value to the owners. (R. 426-427). However, without prejudice to the position that has just been taken, and without conceding that the existence of a right to redress has been adequately proved so as to merit notice by the Court, it seems to be desirable to include an examination of the legal basis of the question in an Appendix (infra p. 126).

It will be clear as a result of such examination of the Canadian laws that the landowner in question could not present a tortious claim by Petition of Right; that he had no claim against the servants of the Crown who con-

ducted the physical regulation of the levels of the lake; that he could not present a claim upon the theory that an easement had been expropriated; and that if remedies had existed they would have been barred by the Statute of Limitations and by the acquisition by the Crown of a flowage easement by prescription long before the date of the Lake of the Woods Convention, 1925, and of the compulsory taking of the lands in question. Further, the landowner had no right of action against any private interests because the regulation of levels was conducted by the Crown; and the company, that built Norman Dam originally, was not legally responsible for its subsequent regulation by governmental agencies.

The learned Circuit Judge was of the opinion that it was certain that a remedy was open to the landowner, through the diplomatic channels. It is submitted, with the utmost deference, that the learned Circuit Judge must have been under a misapprehension as to the diplomatic position.

For the purpose of this argument, it may be conceded that, if Canadian agencies had carried out the regulation of lake levels at Norman Dam against the will of the United States, a valid international claim would exist, notwithstanding the barring of the landowner's claim, whether by the operation of the Statute of Limitations, the acquistion of an easement by prescription or any other special rules of law in force in Canada. Further, for the purpose of this argument, the possible effect of laches upon an international claim may be overlooked, and the principle that a claimant must first seek redress in the domestic tribunals, may be disregarded. It becomes unnecessary to raise these possible points, because

of the attendant circumstances, regarded from a diplomatic point of view. The object of the regulation as carried on during the thirty-year period, was the maintenance of summer levels in the interests of navigation, —a matter of great concern to the United States Government. Indeed, the United States Government urged the Canadian Government, in the interest of navigation, to maintain the levels at an even higher range than that which was being maintained by the then existing control (Final Report of the International Joint Commission, p. 18, Ex. 71, v. R. 278, Appendix F, infra p. 122). The United States Government did not make diplomatic representations protesting against the action of the Canadian governmental authorities in regulating levels in the interest of navigation. On the contrary, the United States Government urged the maintenance of even higher levels, and the whole action of the Canadian governmental authorities in maintaining the levels established by Norman Dam in the interest of navigation, can appropriately be regarded as action taken at the request of and with the full concurrence of the United States Government. The maxim that one cannot blow both hot and cold is applicable in diplomacy as well as in the field of municipal law. If the United States Government had protested against the injury to the landowner in question and urged consideration of his claim, the obvious and conclusive reply would have been that the injury was incidental to action taken with the full concurrence of the United States Government. If the matter had been referred to a Claims Commission, the tribunal would necessarily have ruled that the United States Government could not, in the circumstances, submit the claim. It could not be an international wrong to the United States to comply with the request of the State Department to the extent

that the allegedly delinquent government was capable of responding.

Accordingly, it is obvious that the landowner could not, at any time, have obtained redress through the diplomatic channels.

In any event, it is, in the present circumstances, idle to speculate with regard to diplomatic redress. It has already been pointed out (supra p. 11), that the Governments of the two countries referred the questions arising out of the regulation of the level of the Lake of the Woods, to the International Joint Commission. After extended hearings and a report by the Commission, the international questions were settled by the conclusion of the Lake of the Woods Convention, 1925. This Convention contained appropriate provisions to compensate the landowners for all past damages, and proceedings are available to all landowners to recover past damages under the enabling legislation.

While it has been established that the landowner was not in a position to recover damages for the injury done to his property, it is difficult to appreciate the significance of this point in relation to the question of special adaptability. Even if the landowner had available to him ample remedies whereby he could have recovered damages (which opportunity was terminated by the legalization of the regime of levels, upon the conclusion of the Lake of the Woods Convention), it does not follow that he would be entitled to recover either past damages or compensation for the taking of a flowage easement on the basis of special adaptability. The damages recoverable could not possibly have had any relation to special adaptability values. They would have been restricted to the injuries actually suffered by the landowner.

B.

Whether the ruling of the Circuit Court of Appeals in this matter is inconsistent with the Boundary Waters Treaty 1909.

The Circuit Court of Appeals, in the majority opinion, took the view that the owners would not have a right to compensation from the Canadian agencies which were responsible for the flooding (R. 426-7). It has been contended by the petitioner that this is a construction of the Treaty in a manner prejudicial to the rights of owners of riparian lands in the United States, and contrary to the terms of the Treaty and likely to cause international misunderstanding.

This view, and also the statements in the dissenting opinion (R. 432), are apparently based upon the theory that the cases were covered by the provisions of Article II of the Treaty. In the dissenting opinion, the second clause of the first paragraph of Article II is quoted, and the effect of the first part of the paragraph upon the interpretation of the second, seems to have been overlooked. The article as a whole should be examined:—

ARTICLE II

> Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of *all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters;* but it is agreed that any interference with or diversion from their natural channel of *such waters* on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the

country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.

It is understood, however, that neither of the High Contracting Parties intends by the foregoing provision to surrender any right, which it may have, to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary. (Italics supplied.)

Reading the whole of the first paragraph, it is clear that the words "such waters" are necessarily restricted to the waters described in the preceding part of the sentence, namely "all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters." "Such waters," therefore, would be limited to waters that would in their natural channels flow across the boundary or into boundary waters. The words could not include the waters at the outlets of the Lake of the Woods. These waters would not, in their natural course, flow across the boundary and obviously, being boundary waters, they could not be regarded as waters flowing into boundary waters. The provisions of Article II cannot possibly have any relation to interferences with or diversions of boundary waters, or to interferences with or diversions in the lower reaches of waters flowing across the boundary. They are obviously intended to relate solely to interferences with or diversions in the upper waters of streams that flow across the boundary, or into boundary waters, when such action causes injury in the lower reaches of the stream on the other side of the boundary.

The position under the Treaty may be illustrated by taking the case of a well known river, such as the Red River of the North, which flows from the United States

into Canada. Under the terms of Article II, the United States has reserved exclusive jurisdiction and control over all action relating to the Red River, up to the place at which it crosses the international boundary line. That is to say, the use and development of the upper portion of the water is not, by the Treaty, placed under the control of the International Boundary Commission. On the other hand, recognizing that action in relation to the upper reaches of such a river might cause injury to riparian proprietors and others in Canada, such injured persons in Canada are given a right of action in the courts of the United States. On the other hand, the lower reaches of the Red River in Canada are placed under the supervision of the International Joint Commission. Dams or other obstructions that might retard levels on the United States side of the boundary line, are absolutely under the control of the International Joint Commission and are dealt with in certain of the other articles of the Treaty, particularly Articles IV and VIII. If injury results to interests in the United States, the injured parties would be provided for by the International Joint Commission, pursuant to the terms of Article VIII. In a river such as the Columbia, which flows from north to south, the position would be precisely reversed.

It is clear, therefore, that the landowners did not have any right to redress under the terms of Article II of the Treaty.

The general scheme of the Treaty is apparent upon analysis, particularly, analysis of the provisions relating to works in waters that affect conditions on the other side of the international boundary. Works in upper reaches of streams flowing across the boundary, or into boundary waters, come under the provisions of Article II. Works in waters flowing from boundary waters or

in waters at a lower level than the boundary in rivers flowing across the boundary, come under the provisions of Article IV. Works in boundary waters affecting the natural level or flow of boundary waters on the other side of the line, come under the provisions of Article III. It is clear that the Lake of the Woods comes within this category because it undoubtedly is a boundary water as interpreted in the preliminary article of the Boundary Waters Treaty. (Infra p. 103).

It is thus clear that the question of control and regulation of the Lake of the Woods would not come under the provisions of Articles II or IV, but would come under the provisions of Article III, unless excluded from Article III by the terms of that article. An examination of the terms of Article III (infra p. 105) indicates that the High Contracting Parties intended to save from the operation of the article " the uses, obstructions and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto." It is submitted that both the Rollerway and Norman Dams and the consequences of their construction and operation were thus excepted—both because they were uses and obstructions " heretofore permitted " and because they were " provided for by special agreement ".

In considering the meaning of these words, " heretofore permitted," it is clear that they should not be interpreted as being restricted to express permissions. The question has recently been before the Court in *Pigeon River Improvement, Slide & Boom Co.* v. *Charles W. Cox, Ltd.* (Reported in the United States Law Week. Vol. 1, No. 20, pp. 12-15.) The Court decided that the improvements on the Pigeon River constituted " structures and uses which had been permitted by the Parties prior to the Treaty of 1909" and consequently recognized by that treaty. It is true that the circumstances were dif-

ferent in detail in the Pigeon River case from those surrounding the building and maintenance of Rollerway Dam and Norman Dam. In the Pigeon River case the works had been constructed on the Minnesota side of the river, pursuant to authority granted by the State of Minnesota, and they corresponded to co-ordinated works in the Province of Ontario, constructed pursuant to authority derived from that Province. Neither the United States nor the Dominion of Canada, the appropriate permitting authorities, expressly permitted the construction or maintenance of the improvements. The works, however, had been constructed and maintained, without any protest from the federal authorities on either side of the international boundary, and no action had been taken by either federal authority that was inconsistent with a tacit but real permission. The circumstances were essentially the same in principle as those which existed in the presented instance. The old Norman Dam was built and controlled, up to the date of the Treaty of 1909, under the authority of the Province of Ontario. Neither the United States of America nor the Dominion of Canada expressly permitted the construction and maintenance of the Dam. On the other hand, neither the Government of the United States nor the Government of Canada took any action at any time that was inconsistent with a tacit but real permission. Indeed the action of the Government of the United States in urging a more effective control at Norman Dam can be regarded as cogent evidence of the reality of the tacit permission. It was certainly much stronger evidence of the tacit permission than any action by the Government of Canada in the Pigeon River case. Accordingly, following the principles underlying the decision of this Court in the Pigeon River case, it is submitted that the old Norman Dam must be considered as an obstruction

heretofore permitted and, consequently, as not coming under the provisions of Article III.

Moreover, the uses and obstructions resulting from the Rollerway and Norman Dams were excepted from the operation of the Treaty of 1909 because they were "provided for by special agreement". The Lake of the Woods Convention was obviously such a "special agreement", and, when made in 1925, its provisions thereupon became applicable to the pre-existing "uses, obstructions and diversions" resulting from the Rollerway and Norman Dams to the exclusion of the provisions of the Treaty of 1909.

Neither the construction placed upon Article II of the Treaty by the Circuit Court of Appeals in the majority opinion, nor the construction of the Treaty advanced in the preceding paragraph, are in any manner prejudicial to the rights of riparian proprietors in the United States. The fact that they had no remedy under Article II or that their case did not come under the provisions of Articles II, IV or VIII, does not mean that their rights were prejudiced in any way. The Treaty provided for governmental references under Article IX and the remedies thus available are ample and effective. They are illustrated, in concrete form, by the procedure for recovering past damages under the Lake of the Woods Convention and Enabling Legislation which resulted directly from the governmental reference under Article IX.

Further, neither interpretation is contrary to the terms of the Treaty. They are completely in accord both with a strict literal construction of the instrument and with the broad general scheme of the regime thereby established. It seems hardly necessary to argue that the constructions are unlikely to cause international misunderstanding. The interpretation placed upon the Treaty

in the dissenting opinion, departing as it does from the language of the instrument and conflicting with the whole structure of the international regime, under the Boundary Waters Treaty, 1909, would cause very serious international misunderstandings.

C.

Whether the Ruling of the Circuit Court of Appeals in this matter is inconsistent with the Lake of the Woods Convention 1925.

This point is raised in the Petitioners' Brief, on Certiorari, at pp. 23 and 24. It is apparently based upon the statement in the dissenting opinion of Booth, Circuit Judge (R. 437-438).

> "The rulings of the Court on the offers to prove and the charge of the Court were, it seems to me, contrary to the spirit, if not to the express provisions, of the treaty of 1925 and the Act of Congress for carrying it into effect.
>
> "The treaty provides (Article IX, supra):—
>
> 'The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.'
>
> "The statute above quoted (44 Stat. 617) provides for an ascertainment of damages to the landowners by reason of flowage prior to the treaty.
>
> "The rulings of the Court on the offers to prove and the charge of the Court, however, held in effect that as a matter of law there could be no such damages."

This statement seems to imply that the rulings of the Court on the offers to prove, held, in effect, that, as a matter of law, there could be no damages available to the landowners under Article IX of the Lake of the Woods Convention and under the enabling legislation.

It is submitted, with deference, that this view is based upon a complete misconception of the ruling of the

trial judge and of the relation between the past damage claims and the present proceedings.

It has already been pointed out, in the first section of the argument, that the Lake of the Woods Convention makes a sharp distinction between past damages and compensation for the acquisition of the flowage easements. This distinction is accentuated by the enabling legislation which provides for two entirely separate sets of proceedings. It is hardly necessary to argue that the High Contracting Parties, in concluding the Lake of the Woods Convention, did not intend to provide that the landowner should be paid twice for the same injury. The words used in the Convention plainly indicate that it was intended that they should be paid by the United States for past damages and that Canada was to furnish the funds, in whole or in part, to cover compensation for the acquisition of the flowage easements. To bring into account past damage claims in the present proceedings would inevitably lead to a miscarriage of justice and would defeat the manifest intention of the Convention.

Obviously, if the trial judge or the Circuit Court of Appeals in the majority opinion had purported to rule that the landowners had no right to compensation in the past damage proceedings, such a course would have been contrary to both the letter and the spirit of the Convention. No such action has, however, been found in the record, and any words that may even suggest a denial of the landowners' claims for past injuries must be construed in their settings, namely in cases in which the past damage claims were irrelevant considerations and in which the negativing of the existence of a claim against the Canadian Government at or prior to the date of the Convention, had no reference to the landowners' claims for redress in the past damage proceedings.

III

ANSWERS TO VARIOUS POINTS MADE IN PETITIONERS' BRIEF

1

In Part I of the Argument (supra pp. 16-19) it has been established that there never was and never could have been any purchaser of easements for reservoir use, except the expropriating authority.

At pages 30, 31, 36 and 37 of the Petitioners' Brief, there is a discussion of the trial Judge's refusal to permit the petitioners to prove that there was competition between the Ontario and the Manitoba power interests such that one or the other of these groups would have acquired the flowage easements if the Government had not undertaken to do so, and that it would have been entirely practical for either of these groups to have acquired all the flowage, through private negotiation and purchase. This argument would seem, at first impression, to weaken the position stated in the preceding paragraph. Upon analysis, however, it will appear that the trial Judge was right in rejecting such evidence.

It is clear that the evidence of competition between Ontario and Manitoba power interests is not a proper matter for expert or opinion testimony. If these power interests had been actually in the market for all of the United States titles which they could acquire, it should have been proved as a fact, and not by the opinion of experts testifying that it would seem probable that such was the fact. It is difficult to believe that any power company, or group of power promoters, could have afforded to pay special adaptability values, for any of

the innumerable titles, without knowing that all could be acquired. This could not possibly be known. Further, these Canadian power interests would have had no possible reason for paying any money for the acquisition of a single title in the United States, unless the owner of such title had a cause of action against the power companies. It is clear that the landowners had no cause of action against the companies at any stage (infra p. 127). Further, it is incredible that these interests would have paid money for the acquisition of any of the land titles or flowage easements, when it is recognized that, even if they had acquired all of the flowage rights on the entire shore of the Lake of the Woods, they would not have thus acquired the right to maintain a storage reservoir.

In these circumstances, it is submitted that the trial Judge was right in rejecting an offer to prove the assumed existence of such competition by expert or opinion testimony.

2

At pages 33 and 34 of the Petitioners' Brief, reference is made to the exclusion of statements which had been made in the course of the Hearings before the International Joint Commission, by representatives of the Winnipeg Power interests. It will be observed that these statements were made in the course of Hearings before a Commission which was to make recommendations with regard to the treatment of the Lake of the Woods problem as a whole. They do not suggest independent action by the power interests. They merely urge that generous provision for compensation should be recommended by the Commission and recognize that it would be just that this should ultimately be paid by power users.

The opinions of lawyers arguing before the International Joint Commission could not possibly be evidence of what Olson, Karlson and Brewster were entitled to recover in eminent domain proceedings in the United States, and it is submitted that the evidence was properly excluded (R. 117).

They are cited in the Petitioners' Brief as controverting the statement in the majority opinion that "it was not until the Convention of 1925 that there was any possibility of the landowner receiving any compensation for this taking of his land". It is submitted that they do not in any sense controvert the statement in the majority opinion. The learned Judges in the majority opinion did not contradict or overlook the fact that, for thirteen years preceding the date of the Convention, international negotiations and investigations had been pending with a view to the conclusion of a Convention of this character. It is clear that what the learned Judges meant was that there was no possibility of the landowners receiving compensation from any source other than proceedings resulting from the Convention.

3

At page 41 of the Petitioners' Brief, it is stated that the power interests had invested millions on the assumption that the use of riparian lands for flowage purposes would continue. If true, it does not follow that the power interests would have invested more money in the acquisition of riparian rights in the United States.

4

At page 51 of the Petitioners' Brief, reference is made to Attorney General v. De Keysers Royal Hotel Ltd. L.R. (1920) A.C. 508. In that case Lord Dunedin made the following statement:—

> "The other point is as to the remedy. I am of the opinion that a Petition of Right lies, for it will lie when in consequence of what has been legally done any resulting obligation emerges on behalf of the subject. The Petition of Right does no more and no less than to allow the subject in such cases to sue the Crown. It is otherwise when the obligation arises from tort, but, as already insisted on, what was done here, so far as the taking of the premises was concerned, was perfectly legal." (at pp. 530, 531).

It does not follow that Petition of Right would have been available against the Crown for flooding prior to the date of the Convention. The principle as stated by Lord Dunedin cannot be questioned, but, in order that it may be applicable, there must be an obligation emerging on behalf of the injured party, and it must be a legal obligation of which the Courts may take cognizance. The landowner's position is set forth in Appendix "G", at pages 135 et seq. of this brief. It is clear that there was no legal obligation, cognizable by the Courts, that could be the basis of a Petition of Right by the owners of riparian lands in Minnesota. The position as established by the decision in Muskoka Mill Co. v. the Queen, 28 Grant 563, (infra p. 130), has not been affected by the decision of the House of Lords in the former case.

5

At page 20 of the Petitioners' Brief, it is stated that one of the reasons advanced in the majority opinion of the Circuit Court of Appeals was that, where the power of eminent domain is exercised, special adaptability must be left out of consideration. This is not a fair statement.

The position taken by the Court was that, if the exercise of the power of eminent domain was essential in order to acquire all the titles, special adaptability must be left out of consideration.

6

At page 60 of the Petitioners' Brief, it is argued that the potential use should not be considered as too remote and speculative, because the union of petitioners' lands was an accomplished fact. The so-called union of the lands merely refers to the physical existence of an actual reservoir which had existed as far back as 1887. This matter is discussed in this brief at pp. 82-85, and particularly at page 83. The physical flooding of the lands is not the important question. The question is whether anyone would have paid money to acquire titles in the United States. As argued at the pages cited, and elsewhere in this brief, no one would have paid for such titles, because payment was unnecessary, and because the acquisition of the titles would not have given the purchaser the right to regulate the levels in the interests of power, and the legal right to the continued existence of the reservoir and continued privilege of the regulation.

7

At pages 77 and 78 of the Petitioners' Brief it is argued that the reasons advanced in the majority opinion are inconsistent with one another. It is contented that the finding that petitioners had no rights of redress and were "helpless" in the matter, is inconsistent with holding that the exercise of eminent domain was necessary to unify the titles.

It is submitted that there is no inconsistency between these views. It has been established elsewhere in this brief that the petitioners were helpless in the sense that

they could not stop the flooding, and had no rights of redress. On the other hand, the exercise of eminent domain was necessary to unify the titles. In concluding the Convention of 1925, the two countries decided that it was fair that property owners should be paid for the damage actually done to them, both for past damages and for the acquisition of flowage easements. Without such a convention or treaty, such payment would never have been made, and it was only by the conclusion of such a convention, implemented by appropriate legislation and the exercise of the power of eminent domain, that the titles could be unified and a legally constituted reservoir established. Dependable levels of the Lake and dependable flow in the Winnipeg River, based upon regulation of the Lake levels—such as would justify expenditures, dependent upon such levels and flow, and such as would create economic values, as a result of such regulation—did not exist until after the conclusion of the Convention of 1925 and the enactment of the implementing legislation in the United States.

IV.

CONCLUSION

The preceding argument is submitted on behalf of the Government of Canada as establishing that the petitioner is not entitled to compensation on the basis of special adaptability of his lands for reservoir purposes, in the existing circumstances. There never was, and never could have been, any purchaser of easements for reservoir use, except the expropriating authority. The expropriating authority, in this particular instance, involved the two Governments acting conjointly and exercising the treaty-making power, and the Government of the United States, pursuant to such joint action, exercising the power of eminent domain. Further, the obstacles in the way of reservoir construction, by private enterprise, made the possibility of a reservoir use of the lands too remote and uncertain to constitute an element of value. It is also confidently submitted that the position taken by the Trial Judge and by the Circuit Court of Appeals is completely in accord with the different treaties and conventions which affect this situation.

In this brief, the detailed questions relating to the admission or rejection of evidence have not been discussed, but they are completely dealt with in the brief of the Government of the United States. It does, however, appear that the rejections of evidence complained of all fall under one central principle. It is submitted that the petitioner is not entitled to compensation upon the ground of special adaptability and that, therefore,

the evidence in question adduced for the purpose of establishing values based upon special adaptability, and which was relevant only to that issue, was properly rejected by the Trial Judge.

Respectfully submitted,

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Of counsel for the Government of Canada.

JANUARY, 1934.

APPENDICES

While these appendices are designed, for the convenience of the Court, to set out the respective matters which are deemed to be helpful in the consideration of the contention presented on behalf of the Government of Canada in these appeals; it is requested that such appendices shall not be construed as barring reference to and consideration of any other evidence on record in these cases.

APPENDIX "A"

BOUNDARY WATERS TREATY

Treaty Between His Majesty and the United States of America Relating to Boundary Waters and Questions Arising Along the Boundary Between Canada and the United States.

Signed at Washington, January 11, 1909.

(Ratifications exchanged at Washington, May 5, 1910)

. . . . . .

Preliminary Article

For the purpose of this Treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their

natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

. . . . . .

ARTICLE II

Each of the High Contracting Parties reserves to itself or to the several State Governments on the one side and the Dominion or Provincial Governments on the other, as the case may be, subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any interference with or diversion from their natural channel of such waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs; but this provision shall not apply to cases already existing or to cases expressly covered by special agreement between the parties hereto.

It is understood, however, that neither of the High Contracting Parties intends by the foregoing provision to surrender any right which it may have to object to any interference with or diversion of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary.

Article III

It is agreed that, in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by special agreement between the Parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.

The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbours, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes.

Article IV

The High Contracting Parties agree that, except in cases provided for by special agreement between them, they will not permit the construction or maintenance on their respective sides of the boundary of any remedial or protective works or any dams or other obstructions

in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary, the effect of which is to raise the natural level of waters on the other side of the boundary unless the construction or maintenance thereof is approved by the aforesaid International Joint Commission.

It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other.

. . . . . .

ARTICLE VIII

This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this Treaty the approval of this Commission is required, and in passing upon such cases the Commission shall be governed by the following rules and principles which are adopted by the High Contracting Parties for this purpose:

The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters.

The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:

(1) Uses for domestic and sanitary purposes;

(2) Uses for navigation, including the service of canals for the purposes of navigation;

(3) Uses for power and for irrigation purposes.

The foregoing provisions shall not apply to or disturb any existing uses of boundary waters on either side of the boundary.

The requirement for an equal division may in the discretion of the Commission be suspended in cases of temporary diversions along boundary waters at points where such equal division can not be made advantageously on account of local conditions, and where such diversion does not diminish elsewhere the amount available for use on the other side.

The Commission in its discretion may make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and in such cases may require that suitable and adequate provision, approved by the Commission, be made for the protection and indemnity against injury of any interests on either side of the boundary.

In cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters or in waters flowing therefrom or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

The majority of the Commissioners shall have power to render a decision. In case the Commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the Commissioners on each side to their own Government. The High Contracting Parties shall thereupon endeavour to agree upon an adjustment of the question or matter of difference, and if an agreement is reached between them, it shall be reduced to writing in the form of a protocol, and shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement.

Article IX

The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report, whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports to their respective Governments.

In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government.

APPENDIX "B"

CONVENTION TO REGULATE THE LEVEL OF THE LAKE OF THE WOODS

Signed at Washington, February 24, 1925.

(Ratifications exchanged at Washington, July 17, 1925.)

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada, and the United States of America,

Desiring to regulate the level of Lake of the Woods in order to secure to the inhabitants of Canada and the United States the most advantageous use of the waters thereof and of the waters flowing into and from the lake on each side of the boundary between the two countries; and

Accepting as a basis of agreement the recommendations made by the International Joint Commission in its final report of May 18, 1917, on the Reference concerning Lake of the Woods submitted to it by the Governments of Canada and the United States of America,

Have resolved to conclude a Convention for that purpose and have accordingly named as their plenipotentiaries:—

His Britannic Majesty, in respect of the Dominion of Canada: The Honourable Ernest Lapointe, K.C., a Member of His Majesty's Privy Council for Canada and Minister of Justice in the Government of that Dominion; and

The President of the United States of America: Charles Evans Hughes, Secretary of State of the United States;

Who, after having communicated to each other their full powers, found in good and due form, have agreed as follows:—

ARTICLE 1

In the present Convention, the term "level of Lake of the Woods" or "level of the lake" means the level of the open lake unaffected by wind or currents.

The term "Lake of the Woods watershed" means the entire region in which the waters discharged at the outlets of the Lake of the Woods have their natural source.

The term "sea-level datum" means the datum permanently established by the International Joint Commission at the town of Warroad, Minnesota, of which the description is as follows:—

> "Top of copper plug in concrete block carried below frost line, and located near fence in front of and to the west of new schoolhouse. Established October 3, 1912. Elevation, sea-level datum, 1068·797."

"The International Joint Commission" means the Commission established under the Treaty signed at Washington on the 11th day of January, 1909, between His Britannic Majesty and the United States of America, relating to boundary waters and questions arising between the United States and Canada.

ARTICLE 2

The level of Lake of the Woods shall be regulated to the extent and in the manner provided for in the present Convention, with the object of securing to the inhabitants of Canada and the United States the most advantageous use of the waters thereof and of the waters flow-

ing into and from the lake on each side of the boundary between the two countries for domestic and sanitary purposes, for navigation purposes, for fishing purposes, and for power, irrigation and reclamation purposes.

ARTICLE 3

The Government of Canada shall establish and maintain a Canadian Lake of the Woods Control Board, composed of engineers, which shall regulate and control the outflow of the waters of the Lake of the Woods.

There shall be established and maintained an International Lake of the Woods Control Board composed of two engineers, one appointed by the Government of Canada and one by the Government of the United States from their respective public services, and whenever the level of the lake rises above elevation 1061 sea-level datum or falls below elevation 1056 sea-level datum the rate of total discharge of water from the lake shall be subject to the approval of this Board.

ARTICLE 4

The level of Lake of the Woods shall ordinarily be maintained between elevation 1056 and 1061·25 sea-level datum, and between these two elevations the regulations shall be such as to ensure the highest continuous uniform discharge of water from the lake.

During periods of excessive precipitation the total discharge of water from the lake shall, upon the level reaching elevation 1061 sea-level datum, be so regulated as to ensure that the extreme high level of the lake shall at no time exceed elevation 1062·5 sea-level datum.

The level of the lake shall at no time be reduced below elevation 1056 sea-level datum except during periods of

low precipitation and then only upon the approval of the International Lake of the Woods Control Board and subject to such conditions and limitations as may be necessary to protect the use of the waters of the lake for domestic, sanitary, navigation and fishing purposes.

ARTICLE 5

If in the opinion of the International Lake of the Woods Control Board the experience gained in the regulation of the lake under Articles 3 and 4, or the provision of additional facilities for the storage of waters tributary to the lake, demonstrates that it is practicable to permit the upper limit of the ordinary range in the levels of the lake to be raised from elevation 1061·25 sea-level datum to a higher level and at the same time to prevent during periods of excessive precipitation the extreme high level of the lake from exceeding elevation 1062·5 sea-level datum, this shall be permitted under such conditions as the International Lake of the Woods Control Board may prescribe. Should such permission be granted, the level at which under Article 3 the rate of total discharge of water from the lake becomes subject to the approval of the International Lake of the Woods Control Board may, upon the recommendation of that Board and with the approval of the International Joint Commission, be raised from elevation 1061 sea-level datum to a correspondingly higher level.

ARTICLE 6

Any disagreement between the members of the International Lake of the Woods Control Board as to the exercise of the functions of the Board under Articles 3,

4 and 5 shall be immediately referred by the Board to the International Joint Commission, whose decision shall be final.

ARTICLE 7

The outflow capacity of the outlets of Lake of the Woods shall be so enlarged as to permit the discharge of not less than forty-seven thousand cubic feet of water per second (47,000 c.f.s.) when the level of the lake is at elevation 1061 sea-level datum.

The necessary works for this purpose, as well as the necessary works and dams for controlling and regulating the outflow of the water, shall be provded for at the instance of the Government of Canada, either by the improvement of existing works and dams or by the construction of additional works.

ARTICLE 8

A flowage easement shall be permitted up to elevation 1064 sea-level datum upon all lands bordering on Lake of the Woods in the United States, and the United States assumes all liability to the owners of such lands for the costs of such easement.

The Government of the United States shall provide for the following protective works and measures in the United States along the shores of Lake of the Woods and the banks of Rainy River in so far as such protective works and measures may be necessary for the purposes of the regulations of the level of the lake under the present convention; namely, the removal or protection of buildings injuriously affected by erosion, and the protection of the banks at the mouth of Warroad river where subject to erosion, in so far in both cases as the erosion results from fluctuations in the level of the lake;

the alteration of the railway embankment east of the town of Warroad, Minnesota, in so far as it may be necessary to prevent surface flooding of the higher lands in and around the town of Warroad; the making of provision for the increased cost, if any, of operating the existing sewage system of the town of Warroad, and the protection of the waterfront at the town of Baudette, Minnesota.

ARTICLE 9

The Dominion of Canada and the United States shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.

Each shall likewise assume responsibility for any damage or injury which may hereafter result to it or to its inhabitants from the regulation of the level of Lake of the Woods in the manner provided for in the present Convention.

ARTICLE 10

The Governments of Canada and the United States shall each be released from responsibility for any claims or expenses arising in the territory of the other in connection with the matters provided for in Articles 7, 8 and 9.

In consideration, however, of the undertakings of the United States as set forth in Article 8, the Government of Canada shall pay to the Government of the United States the sum of two hundred and seventy-five thousand dollars ($275,000) in currency of the United States. Should this sum prove insufficient to cover the cost of such undertakings one-half of the excess of such cost

over the said sum shall, if the expenditure be incurred within five years of the coming into force of the present Convention, be paid by the Government of Canada.

ARTICLE 11

No diversion shall henceforth be made of any waters from the Lake of the Woods watershed to any other watershed except by authority of the United States or the Dominion of Canada within their respective territories and with the approval of the International Joint Commission.

ARTICLE 12

The present Convention shall be ratified in accordance with the constitutional methods of the High Contracting Parties and shall take effect on the exchange of the ratifications, which shall take place at Washington or Ottawa as soon as possible.

In faith whereof the above named plenipotentiaries have signed the present Convention and affixed their respective seals.

Done in duplicate at Washington, the 24th day of February, 1925.

(Seal) ERNEST LAPOINTE.

(Seal) CHARLES EVANS HUGHES.

APPENDIX "C"

PROTOCOL ACCOMPANYING CONVENTION TO REGULATE THE LEVEL OF LAKE OF THE WOODS

. . . . . .

2

Should it become necessary to set up a special tribunal to determine the cost of the acquisition of the flowage easement in the United States provided for in Article 8 of the Convention, the Government of Canada shall be afforded an opportunity to be represented thereon. Should the cost be determined by means of the usual judicial procedure in the United States, the Government of Canada shall be given the privilege of representation by counsel in connection therewith.

. . . . . .

APPENDIX "D"

ACT OF CONGRESS 1926

(Public—No. 269—69th Congress)

(H.R. 9872)

An Act To Carry into effect provisions of the convention between the United States and Great Britain to regulate the level of Lake of the Woods concluded on the 24th day of February, 1925.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War be, and he is hereby, authorized and directed to acquire, as soon as practicable after the enactment of this Act, by purchase or by condemnation, in accordance with the provisions of the Act entitled "An Act to authorize condemnation of land for sites of public buildings, and for other purposes," approved August 1, 1888, the flowage easements up to elevation one thousand sixty-four sea-level datum upon all lands in the United States bordering on the Lake of the Woods and such lands or interests therein as are necessary to provide for protective works and measures in the United States along the shores of the Lake of the Woods and the banks of the Rainy River as specified in article 8 of the convention signed at Washington on the 24th of February, 1925, between the Governments of the United States and Great Britain, providing for the regulation of the level of the Lake of the Woods.

In proceeding by condemnation for acquiring such flowage easements on any tract of land any benefit to the remainder of the tract or the property thereon de-

rived from such easement shall be considered and damages shall be awarded accordingly.

Sec. 2. The protective works and measures provided for in article 8 of the convention, or such thereof as the Secretary of War may deem necessary for the protection of the property rights and interests of the inhabitants of the territory affected, shall be constructed, or carried out, under the direction of the Secretary of War and all moneys which may be paid by the Government of Canada to the Government of the United States under article 10 of the convention are hereby appropriated and made available for expenditure by the Secretary of War for the construction of such works, and the carrying out of such measures, and for the acquisition of easements, lands, and interests therein as provided in section 1 of this Act.

Sec. 3. The Secretary of War is hereby authorized and directed to cause to be investigated, as soon as practicable, all claims for damages caused, prior to the acquisition of flowage easements under this Act, to the inhabitants of the United States by fluctuation of the water levels of the Lake of the Woods due to artificial obstructions in outlets of said lake, and after due notice and opportunity for hearing, shall ascertain and determine the loss or injury, if any, that may have been sustained by the respective claimants and to report to Congress for its consideration the amount or amounts he may find to be equitably due such claimants, together with a statement in each case of the substantial facts upon which the conclusion is based: *Provided*, That all claims not presented to the Secretary of War under this provision prior to the expiration of six months from the date of the passage of this Act shall not be considered by him and shall be forever barred.

Approved May 22, 1926.

APPENDIX "E"

ACT OF CONGRESS 1928

(Public—No. 280—70th Congress)

(H.R. 10884)

An Act To amend the Act entitled "An Act to carry into effect provisions of the convention between the United States and Great Britain to regulate the level of Lake of the Woods concluded on the 24th day of February, 1925," approved May 22, 1926.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first paragraph of section 1 of the Act entitled "An Act to carry into effect provisions of the convention between the United States and Great Britain to regulate the level of Lake of the Woods concluded on the 24th day of February, 1925," approved May 22, 1926, is amended to read as follows:

"That the Secretary of War be, and he is hereby, authorized and directed to acquire, as soon as practicable after the enactment of this Act, by purchase or by condemnation, in accordance with the provisions of the Act entitled, 'An Act to authorize condemnation of land for sites for public buildings, and for other purposes,' approved August 1, 1888, and in accordance with the constitutional provisions of the State of Minnesota which provide that private property shall not be taken, destroyed, or damaged for public use without just compensation therefor first paid or secured, the flowage easements up to elevation one thousand and sixty-four sea-level datum upon all lands in such State bordering on the Lake of the Woods, Warroad River, and Rainy River, and such lands or interests therein as are necessary to provide for the protective works and measures in such State along the shores of the Lake

of the Woods and the banks of the Warroad River and the Rainy River as specified in article 8 of the convention signed at Washington on the 24th day of February, 1925, between the Governments of the United States and Great Britain providing for the regulation of the level of the Lake of the Woods."

Sec. 2. Section 1 of such Act approved May 22, 1926, is amended by adding at the end thereof a new sentence to read as follows:

"In such condemnation proceedings fees and mileage of witnesses shall be assessed against the United States to the same extent in any given case as if the proceeding had been initiated by a private corporation."

Sec. 3. Section 3 of such Act approved May 22, 1926, is amended to read as follows:

"Sec. 3. The Secretary of War is hereby authorized and directed to cause to be investigated, as soon as practicable, all claims for damages caused, prior to the acquisition of flowage easements under this Act, to the inhabitants of the United States by fluctuation of the water levels of the Lake of the Woods due to artificial obstructions in outlets of said lake, and after due notice and opportunity for hearing, shall ascertain and determine the loss or injury, if any, that may have been sustained by the respective claimants and to report to Congress for its consideration the amount or amounts he may find to be equitably due such claimants, together with a statement in each case of the substantial facts upon which the conclusion is based: *Provided*, That all claims not presented to the Secretary of War under this provision prior to the expiration of thirty days from the date of the passage of this amendatory Act, shall not be considered by him and shall be forever barred."

Approved, April 18, 1928.

APPENDIX "F"

EXCERPTS FROM THE FINAL REPORT OF THE INTERNATIONAL JOINT COMMISSION

(Foot-notes omitted).

Pages 16-17-18

"The first attempt to exercise a measure of control over the level of the Lake of the Woods was made 30 years ago. It appears from the evidence submitted at public hearings and from our investigation, that because of the low stages of water in the lake for some time prior to 1887, the interest of navigation, then considerable on the Canadian side, was seriously affected. For the purpose of improving this condition, and mainly for the benefit of navigation, the Dominion Government authorized the construction of a dam, known as the Rollerway Dam, in the western outlet of the lake. To aid in the accomplishment of this purpose the Government appropriated the sum of $7,000.

"From the evidence it also appears, and this is not disputed, that the construction of the Rollerway Dam had the effect of raising the natural level of the lake an average of 1·5 feet during the years 1893 to 1898 for which continuous records are available.

"Some of the evidence obtained, including two records of water levels given in table 6, page 24, Report of the Consulting Engineers, indicates that when first built this dam raised the level of the lake substantially 3 feet.

"In 1893-1895, under authority of the Government of Ontario, another dam known as the Norman Dam was built by the Keewatin Power Company (Ltd.), in the Winnipeg River about a mile below the Rollerway Dam. The Norman Dam consists of a rock fill and 20 masonry piers with sluices, controlled by means of stop logs. It was originally intended for power development, but the project was never completed. The stop logs were not placed until 1898, when, under a contract with the Keewatin Power Company the Provincial Government paid the company $4,000 to be used in providing the necessary

stop logs, and at the same time secured the right, subject to cancellation by either party upon one month's notice, to thereafter control the dam for the benefit of navigation.

"Since November 19, 1898, the dam has been so controlled by the Provincial Government under this contract.

"The contract also provided that in case of cancellation at the request of the company, 'It shall nevertheless be the duty of the company to maintain the water at ordinary summer level for such purposes as aforesaid at all proper time and times thereafter.' In the contract liability for damage resulting from raising the lake above ordinary summer level is covered by the following statement:—

"'It is also agreed that the commissioner is not to be responsible for damages occasioned by reason of the water being raised higher than ordinary summer level unless the same is raised for the purpose of, and at the instance of, the Government or by their servants or agents.'

"Although the Rollerway Dam, constructed in 1887-88, was removed in 1899, the effect of the construction and maintenance of the Norman Dam upon the level of the Lake of the Woods was similar to that of the Rollerway Dam, but more marked, in that it maintained the mean lake level about 3·5 feet above what it would have been under natural conditions. The increase over the levels which would have prevailed with the outlets in a state of nature has varied from 0·9 foot in 1899 to 6·3 feet in 1913."

Pages 18-19

"*Warroad Harbour Improvement*

"In 1902, on the basis of surveys of Warroad River, authorized by the Congress of the United States and made by engineers of the United States War Department in 1899 to 1900, a project was adopted by Congress for the improvement of Warroad Harbour so as to provide a 7-foot channel. In the plans for this improvement, all depths were reduced to what the War Department later referred to as the 'normal' level of the lake; that is, a stage of 7·2 feet on the Warroad gauge, corresponding to 1,060·8, sea-level datum.

"This is the stage which prevailed on the lake at the beginning of the survey in December, 1899. In each navi-

gation season between 1901 and 1904 the lake level fell somewhat below the stage of 1,060·8 and in 1904 it reached that stage for only a few days.

"When the project was extended by Congress early in 1905, the United States engineers in charge, knowing of the existence of a dam in one of the outlets of the lake by means of which the level could be to some extent controlled, believed that through co-operation with the proper Canadian authorities the dam could be so operated as to secure a level more satisfactory to the maintenance of the projected depths in Warroad Harbour than the stage which had prevailed since the adoption of the project.

"As a consequence in May, 1905, the Government of the United States suggested to the Government of the Dominion of Canada that the Norman Dam be so operated as to prevent the level of the Lake of the Woods from falling below the datum of 7·2 on the Warroad gauge, i.e. 1,060·8, sea-level datum.

"After investigation and consideration of the matter, the Canadian Government concluded that the request of the United States Government could not be granted because the maintenance of the minimum stage of 7·2 would result in injury to important industries at Keewatin and Kenora in time of high water, and also because it would be impossible to maintain a minimum stage of 7·2 during low water without constructing a dam in the eastern outlet of the lake.

"This conclusion was never officially communicated to the Government of the United States. In 1906 the eastern outlet of the lake was completely closed by the construction of a power plant by the town of Kenora.

Pages 26-27

"Regulation desirable

"A careful study of the physical data submitted in the report of the consulting engineers, and a consideration of all the interests involved, lead to the conclusion that it is practicable and desirable to maintain the lake at a relatively uniform level throughout all ordinary seasons, but that in order to secure the most advantageous use of the waters flowing from the lake it is necessary to permit a draft on the water stored in the lake, in excess of 2 or 3 feet,

during periods of exceptional drought occurring about once in 20 years, for the purpose of maintaining a satisfactory outflow; and also to permit the storage of some of the flood water above the ordinary maximum level during occasional years of excessive flood inflow.

"*The recommended level*

"Because of the diverse requirements of the various interests, it is an impossibility to recommend a level or regimen of levels which would be of equal desirability to all these interests. After careful consideration of all the factors entering into this problem, the commission is of the opinion that, subject to proper compensation and protection being provided, for property and interests injuriously affected, the most advantageous use of the waters of the Lake of the Woods and of the waters flowing into and from that lake and of the shores and harbours of the lake, can be secured by maintaining the level of the lake at an ordinary maximum stage of 1,061·25 sea-level datum. Whenever the level of the lake rises to 1,061·0, sea-level datum, water shall be wasted or conserved as directed by the commission under the system of international supervision and control hereinafter recommended, and between 1,056 and 1,061 water may be drawn from the lake by the appropriate authority in Canada for the benefit of Canadian interests, provided, however, that the level of the lake shall not, even toward the end of a series of dry years, be drawn below 1,056 sea-level datum, without the approval of this commission, and then only on such terms and conditions as it may impose."

APPENDIX "G"

NOTE CONCERNING THE LANDOWNERS CLAIM FOR REDRESS AGAINST CANADIAN AGENCIES IN CANADA AND UNDER THE CANADIAN LAW

In the dissenting opinion of Mr. Justice Booth, the following statement is made:—

> "(3) Nor was the situation of the landowner as to recovery of such flowage use value as damages from the trespassers one of mere hopeless speculation. Were this the case, it would be a reproach to both Governments concerned. On the contrary, it is, in my opinion, a reasonable and safe conclusion that once the facts were established, the landowner could get compensation in damages in the courts of Canada, if the trespass had been committed by private parties; and probably could obtain compensation by Petition of Right, if the flowage use had been taken by authority of the Canadian Government (*See* Halsbury's Laws of England, Vol. 1, p. 17, paragraphs 21, 22, 23 and 24; and Vol. 10, pp. 26-30; also Vol. 2 D.L.R. (1928), p. 625, annotation "Petition of Right" by Arthur S. Bourinot); and certainly he could obtain redress through diplomatic action between the two Governments.
>
> "Such, substantially, was the situation, in my judgment, when the present condemnation proceedings were brought." (R. 433).

It will be convenient to examine these points in order. They are, shortly:—

(1) That the landowner could get compensation and damages in the courts of Canada if the trespass had been committed by private parties;

(2) That the landowner could obtain compensation by Petition of Right if the flowage use had been taken by authority of the Canadian Government.

1. Whether the landowner could obtain compensation and damages in the courts of Canada if the trespass had been committed by private parties.

This point is based upon the assumption that the water levels of the Lake of the Woods are controlled at Norman Dam by private parties.

The history of the regulation of the level of the Lake of the Woods, by control at Norman Dam at the outlet in Canada, has already been set forth in this brief (pp. 7 to 10, 55 to 64). It has thus been established, beyond all possible doubt, that the levels of the Lake of the Woods have, throughout the whole period, been controlled and regulated by the Crown, whether acting through the Commissioner of Public Works of Ontario, or through agencies of the Government of Canada and the Government of Ontario, jointly. If any trespass has at any time been committed as against the landowner in question (which is not admitted), the Keewatin Power Company could not be legally responsible. The act in question was the act of the Crown and not of the Company. The landowner's lands were flooded as a result of the regulation and control of levels by the Commissioner of Public Works. That control and regulation were based upon appropriate statutory authority which will be discussed later. The Company was powerless to prevent or influence in any way the control and regulation of the levels of the Lake by the Commissioner or the consequental flowage of the landowner's lands. There is no principle of law, recognized in Canada, that would justify an action against the Company based upon injuries resulting from the control and regulation of the levels of the Lake by the Commissioner of Public Works, even although the instrument used for such control and regulation was a dam built by the Company.

A question, involving similar principles, was considered in a case in the Judicial Committee of the Privy Council, *John Stirrett and Sons v. Kaministiquia Power Co. Ltd.* (1930) 1 D.L.R. 445. In that case, the dam in question had been constructed by the Crown and paid for out of public funds. The control of the dam was entrusted by the Minister of Public Works to the Hydro-Electric Commission, but the actual regulation of the water was left in the hands of the respondent company. While the respondent company, through its servants, was performing the manual acts required for control and regulation of the waters above the dam, it was at all times doing these acts subject to the direction, first, of the Hydro-Electric Commission and, later, of the Department of Public Works and the Departmnt of Lands and Forests. Their Lordships ruled that, in these circumstances, an action based upon wrongful control and regulation was misdirected as against the respondent company.

2. Whether the landowner could obtain compensation by Petition of Right if the flowage use had been taken by authority of the Canadian Government.

It is assumed that by the words, "if the flowage use had been taken by the authority of the Canadian Government" the learned Circuit Judge intended to refer to the control and regulation of lake levels by Canadian governmental agencies. There is no indication in the

record and no suggestion that a flowage use was ever taken by the Canadian Government or by any other body or authority. There is, however, the admitted fact that for about thirty years preceding the taking of the lands in question, the levels of the lake were regulated either indirectly or directly by governmental agencies in the interests primarily of navigation and also, at certain times, secondarily, in the interests of power and other activities.

The claim, if any, that the landowner in question might have presented in the Canadian courts would be a claim to the effect that the levels of the lake had been regulated in such manner that his lands were injured by flooding, drying or erosion. His proceedings would be in the nature of trespass, or trespass on the case, and they would be based on the theory that it was wrong for the Crown to effect any disturbances in the natural levels of the lake. The proceedings would necessarily be tortious in their character. There is no suggestion in the record of any contract on which the Crown could be sued. There is no suggestion that the Crown had taken possession of the landowners lands and there is no suggestion of any statutory provision creating a right of redress.

When the position of the landowner is examined, it will be seen that his possible claims might have been as follows:—

(*a*) A claim by Petition of Right against the Crown for damages caused to his land.

(*b*) A claim against the servant of the Crown for damages caused to his lands.

(*c*) A claim by Petition of Right against the Crown for compensation, upon the theory that the action of the Crown in so regulating levels

amounted to a compulsory taking of a flowage easement.

It is unnecessary to consider the period from 1887-1898 when the levels of the Lake of the Woods were regulated by Rollerway dam. It is sufficient to consider the period during which levels were regulated by the old Norman Dam. The possible claims can be considered in order:—

(a) *A claim by Petition of Right against the Crown for damages caused to the landowner's land.*

The short answer to such a claim is that no claim for way of Petition of Right can be made against the Crown in tort. An examination of the authorities cited by the learned Circuit Judge fails to disclose any instance of a successful Petition of Right based on a tortious claim, apart, of course, from claims based upon statutes creating such a right.

In Canada, under the provisions of Section 19 of the Exchequer Court Act, in certain special circumstances, a Petition of Right will lie for tort, particularly under Subsection (*b*), for damage to property injuriously affected by the construction of a public work; and under Subsection (*c*) for death or injury to a person or property, resulting from the negligence of an officer or servant of the Crown, while acting within the scope of his duties, upon a public work.

The landowner in question could not base his claim upon either of these grounds. There is no suggestion of negligence in this case, and consequently it could not be brought under the terms of Subsection (*c*). None of his property was expropriated for the erection of the public work, so that the case could not be brought under Subsection (*b*). It is well settled that claims for compensation, based upon injurious affection arising out of the

use, as distinct from the construction of a work, can only be supported when a part of the claimant's land is being expropriated for the work. The claim is then limited to injurious affection to the remaining land, occasioned by the user of that part of the claimant's land upon which the work is constructed. (*Sisters of Charity v. The King*, L.R. (1922), 2 A.C. 315).

There are no corresponding statutory provisions whereby a claim, tortious in character, can be advanced by Petition of Right against the Crown in right of the Province of Ontario, under the legislation of that Province.

The position under the law in force in Ontario is set forth in the following quotation from the Canadian Encyclopedic Digest, Ontario, Vol. 8, 530. Referring to the Ontario rules, it is stated,—

> "The rules do not authorize any relief against the Crown for a tort committed by a servant of the Crown, thus differing from the Dominion Exchequer Court Act."

The Ontario position is also exemplified by the decision of Spragge C. in *Muskoka Mill Co.* v. *The Queen*, (28 Grant 563). The Crown had built a temporary dam and, subsequently, a permanent dam in the outlet of Muskoka Lakes, in aid of navigation. The company brought a Petition of Right, alleging that the dam had deprived the claimants of waters for their mill below. It was held by the Chancellor that the claim was tortious in its character, and that, consequently, a Petition of Right did not lie. It was pointed out that the suppliant's redress, if any, would be either by action against the servants of the Crown or by proceedings under the Public Works Act.

Accordingly, it is clear that the landowner, in the present case, had no statutory right to proceed by Petition of Right and that he would be debarred by the common law principle set forth above, namely, that no claim by Petition of Right would lie against the Crown in tort.

(*b*) *A claim against the servant of the Crown for damages caused to the landowner's land.*

In considering whether a valid claim would exist against the servant of the Crown for damages caused to the landowner's land, two points arise, namely, whether the action of the Crown in providing for the completion of the dam and the regulation of levels thereby, was authorized by Statute; and if not, whether the landowner's cause of action against the servant of the Crown was barred by lapse of time.

In the first place, it is necessary to refer to the provisions of the Public Works Act, being Chap. 37 of the Revised Statutes of Ontario, 1897. The relevant sections of this statute are set forth in a note for convenient reference (infra p. 137 to 139).

It is clear that the action of the Government of the Province in completing the dam and operating it in order to control levels, was authorized by the terms of Sections 14 and 18 of the Act. Section 18, indeed, expressly provides for cases where public works are completed at the expense of the Province, and provides that they shall be subject to the control of the Department and subject to the provisions of the Act. Accordingly, the action of the Provincial Government and of the Commissioner of Public Works with respect to Norman Dam, had statutory authority which would justify the operation of the dam for the purpose of improving the navigation of the Lake of the Woods, and no action

would lie against the servant of the Crown who actually carried out the work of regulation and control.

Further, even if the landowner in question had a right of action against the servant of the Crown, such right was barred by the Statute of Limitations and by the acquisition of a flowage easement by the Crown in right of the Province of Ontario, upon the expiration of twenty years of actual user.

(c) *A claim by Petition of Right against the Crown for compensation upon the theory that the action of the Crown in so regulating the levels amounted to a compulsory taking of a flowage easement.*

A question might arise as to whether the landowner could have presented a Petition of Right against the Crown for compensation, upon the theory that the action of the Crown in regulating the levels amounted to a compulsory taking of a flowage easement. When the Crown has not taken the steps required by the legislation under which compensation may be claimed, with a view to expropriation, it is not open to the landowner to bring a Petition of Right upon the theory that there has been an expropriation.

This point was decided in *Yates* v. *The King* (20 Ex. C.R. 175). The decision in this case followed arguments on points of law raised in the pleadings. The suppliant, by his Petition of Right, claimed to be the owner of certain lands in the Town of New Liskeard, which were overflowed and flooded as a result of the construction, in 1912, of a dam at the southern end of Lake Temiskaming, by the Department of Public Works of the Dominion of Canada.

Audette J. stated in his judgment,—

> "The action is for the recovery of damages to land and is, therefore, in its very essence one founded in tort.

> Apart from breach of contract or from special statutory authority, no such action will lie against the Crown . . ."
>
> "The respondent, in the present case, has not expropriated (The Expropriation Act, R.S.C. 1906, ch. 143, Sec. 2, Subsection *f*, Sec. 3) the easement to flood the suppliant's land, and it therefore follows that the Court has no jurisdiction to entertain the claim under The Expropriation Act."

Muskoka Mill Co. v. *The Queen*, cited above, may be regarded as authority for the same point under the provincial laws.

At first sight the statement by Cassels J., in *Brown* v. *The King* (12 Ex. C.R. 463) that "the effect of this dam was to expropriate an easement over the meadow lands (1037 acres) of flooding," might appear to be inconsistent with this view. It may be noted, however, that in this case the Crown had taken steps to expropriate the suppliant's land and the Petition of Right and the Information by the Crown in expropriation proceedings were tried together, so that the statement by Mr. Justice Cassels cannot be regarded as laying down a rule to the effect that a subject can by Petition of Right claim compensation where the Crown has not taken the necessary steps required by the statute with a view to such proceedings.

Accordingly, it is clear that the landowner in question would not be able to proceed by Petition of Right for compensation upon the theory that there had been an expropriation. Even if such a course had been open to him, his claim would have been barred by the Statute of Limitation, within six years after the commencement of the regulation; (if the rule laid down by MacLean J. in *Miller* v. *the King*, 1927, Ex. C.R. p. 67, is accepted). In any event, the landowner would have been barred by the acquisition by the Crown of the flowage easement by prescription upon the expiration of twenty years of regulation.

For the information of the Court, the remedial sections of the Public Works Act of the Province of Ontario have been set forth in a note (infra p. 138). It may be observed that they provide procedure for compensation to persons whose lands are being expropriated. From the point of view of the Canadian riparian landowner, there are ample statutory methods whereby the obligation emerging on behalf of the subject from the construction and operation of the work can be satisfied. It would have been beyond the competence of the Legislature of Ontario to make legislative provision for the flowage of Minnesota lands. Accordingly, the statute cannot be construed as attempting to impose servitudes upon Minnesota lands or, correlatively, to provide compensation for the imposition of such servitudes.

The control of levels at Norman Dam, based upon statutory authority, in so far as it caused injury to land in Minnesota, was a matter for diplomacy and not for redress in the Canadian Courts. The landowner could not obtain redress by litigation, but it has already been pointed out that, as a result of international action, culminating in the Lake of the Woods Convention, 1925, he has remedies whereby he can obtain compensation, in separate proceedings, for past damages and for the imposition of a flowage easement upon his property.

Reference has been made to the effect of lapse of time upon possible remedies. The legal position in Ontario, in this respect, is set forth in the Canadian Encyclopedic Digest, Ontario, Vol. 8, at p. 521,—

> "The laws relating to prescription and the limitation of actions in force in any Province between subject and subject apply to any proceeding against the Crown in right of the Dominion in respect of any cause of action arising in such Province, subject to the provisions of any Act of the Parliament of Canada."

Further, there are many instances, in the books, of the judicial recognition of the acquisition of flowage

easements by twenty years user. For instance, in *Bowlby* v. *Woodley*, 8 U.C.Q.B. 318, it was held that the defendant, having for more than twenty years penned back waters upon the land above him by means of a dam erected on his own land, was protected by 10 and 11 Vic. c. 5, even although the land flooded by the back waters belonged to the Crown during the greater part of that period. It is true that the decisions establish that the flowage easement thus acquired after twenty years user, is limited to a right of flooding not more burdensome than that which existed throughout the period, but in this case the regime of regulation was substantially the same throughout, and there were no changes in the height of the dam or the type of regulation.

In presenting this view, it is recognized that the Crown could not obtain a flowage easement over Minnesota lands, capable of enforcement in the courts of the United States. The United States landowner's position could not be better than that of a corresponding Canadian riparian proprietor. In so far as actions in Canadian courts are concerned, his position would be governed by the laws of Canada, and the landowner would be in the same legal position as if his lands had become burdened with such an easement.

Accordingly, it is clear that the landowner in question could not present a tortious claim by Petition of Right; that he had no claim against the servant of the Crown; that he could not present the claim upon the theory that an easement had been expropriated; and that even if a remedy had existed, it would have been barred by lapse of time.

Note to Appendix "G" Setting Forth Relevant Sections of the Public Works Act Referred to Therein

(Revised Statutes of Ontario, 1897, Chap. 37.)

14. All land, streams, water-courses and property, real or personal, heretofore or hereafter acquired for the use of Public Works; all canals, locks, dams, hydraulic works, harbours, piers and other works for improving the navigation of any water; all slides, dams, piers, booms and other works for facilitating the transmission of timber; all hydraulic powers created by the construction of any Public Works; all roads and bridges; all public buildings; all railways and rolling stock thereon; all vessels, dredges, scows, tools, implements and machinery for the improvement of navigation; all drains and drainage works, and all property heretofore or hereafter acquired, constructed, repaired, maintained or improved at the expense of the Province and not under the control of the Dominion Government, shall be and remain vested in Her Majesty and under the control of the Department of Public Works. R.S.O., 1887, c. 33, s. 14.

18. Public Works hereafter constructed or completed at the expense of the Province shall, unless otherwise provided by law, be under the control of the Department and subject to the provisions of this Act. R.S.O. 1887, c. 33, s. 18.

19. The Commissioner shall direct the construction, maintenance and repair of all Public Works in progress, or constructed or maintained at the expense of the Province, and which are by this Act, or may be hereafter,

placed under the control of the Department. R.S.O. 1887, c. 33, s. 19.

29. The Commissioner of Public Works may acquire and take possession, for and in the name of Her Majesty, of any land or real estate, streams, waters, water-courses, fences and walls, the appropriation of which is in his judgment necessary or expedient for the use, construction or maintenance of any Public Work or building; or for the purpose of draining any public building, or for the sewerage service thereof; or for the use, construction or maintenance of hydraulic privileges made or created by, from or at any Public Work; or for the purpose of draining; or for the enlargement or improvement of any Public Work, or for obtaining better access thereto; or for any other public purposes authorized by the Legislature or by the Lieutenant-Governor, and to whatever Department of the Government the purpose may pertain; and the Commissioner may, for such purpose, contract with all persons, guardians, tutors, curators and trustees, whatsoever, not only for themselves, their heirs, successors and assigns, but also for and on the behalf of those whom they represent, whether infants, absentees, lunatics, or other persons otherwise incapable of contracting, possessed of or interested in such lands, real property, streams, waters and water-courses; and all such contracts, and all conveyances or other instruments made in pursuance of any such contract, shall be valid to all intents and purposes whatsoever. R.S.O. 1887, c. 33, s. 29.

WHAT CASES MAY BE REFERRED TO ARBITRATION

62. If any person has a claim for real or personal property taken, or for alleged direct or consequent damage to such property, arising from the construction or connected with the execution of a Public Work undertaken at the expense of the Province, or a claim arising

out of, or connected with, the execution or fulfilment, or on account of deductions made for the non-execution or non-fulfilment of a contract for the execution of any Public Work made and entered into with the Commissioner, either in the name of Her Majesty, or in any other manner whatsoever, such person may give notice in writing of his claim to the Commissioner, stating the particulars thereof, and how the same has arisen; and thereupon the Commissioner may, at any time within thirty days after the notice, tender what he considers a just satisfaction for the same, with notice that unless the sum so tendered is accepted in ten days after the tender, the claim will be submitted to arbitration. R.S.O. 1887, c. 33, s. 62.

63. Before a claim under this Act is arbitrated upon, the claimant shall give security to the satisfaction of the Arbitrators, or one of them, for the payment of the costs and expenses incurred by the arbitration, in the event of the claimant being awarded to pay the costs. R.S.O. 1887, c. 33, s. 63.

64. No person shall be entitled to an arbitration, where by the terms of the contract it is provided that the determination of any matters of difference arising out of or connected with the same shall be decided by the Commissioner, Architect or Engineer, or other officer of the Department. R.S.O. 1887, c. 33, s. 64.

65. No claim of any kind for compensation in respect of a contract made, or for loss or damage occasioned by anything done under this Act, by or under the authority of the Department or the Commissioner, shall be submitted to or entertained by an Arbitrator, unless the claim and the particulars thereof have been filed with the Secretary of the Department within six months next after the loss or injury complained of, or after the date of the final estimate made under such contract. R.S.O. 1887, c. 33, s. 65.

SUPREME COURT OF THE UNITED STATES.

Nos. 580, 581 and 582.—October Term, 1933.

580	Elias A. Olson, Petitioner, *vs.* The United States of America.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
581	Randor G. Karlson, Petitioner, *vs.* The United States of America.	
582	Harry Brewster, Petitioner, *vs.* The United States of America.	

[April 30, 1934.]

Mr. Justice Butler delivered the opinion of the Court.

These cases arise in a condemnation proceeding instituted by the United States in the Federal district court for Minnesota to acquire easements of flowage upon lands bordering upon the Lake of the Woods in that State. The only substantial question is whether, on the facts disclosed by the record and others of which judicial notice may be taken, the actual use and special adaptability of petitioners' shorelands for the flowage and storage of water, that *inter alia* will be available for the generation of power, may be taken into consideration in ascertaining the just compensation to which petitioners are entitled.

The superficial area of the Lake of the Woods is between fourteen and fifteen hundred square miles; it lies in Minnesota, Ontario and Manitoba. Many streams flow into it. The Rainy River and Warroad River are the largest of those touching Minnesota. The former, coming from the east along the international boundary, drains a very large territory lying on both sides of the line. The latter, not so large, coming from the south, drains a considerable area within Minnesota and empties into the southwesterly part of the lake. The outlets of the lake are in Canada; they combine to make the Winnipeg, a great river, flowing northwesterly to Lake Winnipeg. In 1898 a Canadian corporation, by agreement with the Crown, put in operation the Norman dam for the con-

trol of outflow down the Winnipeg. Since the construction of this dam, and in consequence of it and other dams in the outlets, shorelands, in disregard of the rights of owners, have been intermittently flooded for the impounding of water used in Canada for the generation of power and other purposes.

In 1909 the United States and Great Britain made a treaty which (Art. VIII) created an international joint commission and conferred upon it jurisdiction in terms broad enough to include cases involving the elevation of the Lake of the Woods as the result of these dams. 36 Stat. 2451. In 1912 questions arising out of the raising of the lake were referred to the commission and after hearings and extensive studies it made its final report in 1917. The United States and Great Britain then consummated the treaty of 1925 which provides (Article VIII): "A flowage easement shall be permitted up to elevation 1064 sea level datum upon all lands bordering on Lake of the Woods in the United States, and the United States assumes all liability to the owners of such lands for the costs of such easement".[1]

By an Act to carry into effect the provisions of the last mentioned treaty (Act of May 22, 1926, 44 Stat. 617, as amended April 18, 1928, 45 Stat. 431) Congress directed the Secretary of War to acquire by purchase or condemnation flowage easements up to the specified elevation upon all lands in Minnesota bordering

[1]Article IX provides: "The United States and the Dominion of Canada shall each on its own side of the boundary assume responsibility for any damage or injury which may have heretofore resulted to it or to its inhabitants from the fluctuations of the level of Lake of the Woods or of the outflow therefrom.

"Each shall likewise assume responsibility for any damage or injury which may hereafter result to it or to its inhabitants from the regulation of the level of Lake of the Woods in the manner provided for in the present Convention."

Article X contains the following: "In consideration, however, of the undertakings of the United States as set forth in Article VIII, the Government of Canada shall pay to the Government of the United States the sum of two hundred and seventy-five thousand dollars ($275,000) in currency of the United States. Should this sum prove insufficient to cover the cost of such undertakings one-half of the excess of such cost over the said sum shall, if the expenditure be incurred within five years of the coming into force of the present Convention, be paid by the Government of Canada.

Treaty of February 24, 1925, 44 Stat. 2108.

upon the Lake of the Woods, the Warroad River and the Rainy River, and that compensation should be made in accordance with the Constitution of Minnesota which declares (Article I, § 13): "Private property shall not be taken, destroyed or damaged for public use, without just compensation therefor first paid or secured". Commissioners appointed to ascertain the damages sustained by the several owners by reason of such taking made their awards. The United States and these petitioners appealed. The cases were tried together, the jury returned verdicts for the amounts to which petitioners were found severally entitled and judgments were entered accordingly.[2] Petitioners appealed. The Circuit Court of Appeals affirmed. 67 F. (2d) 24.

At the trial petitioners sought to have just compensation ascertained on the theory that the flooding of their lands (for brevity called "use for reservoir purposes"), the circumstances which make them specially adaptable for that use and the fact that prior to condemnation such adaptability had increased their market value should be considered by the jury in determining just compensation. And, in order to establish a basis on which to rest that submission, petitioners offered to prove the following facts:

There are valuable power sites at the outlets and in the Winnipeg river which cannot be fully developed without flooding the shorelands. The industries using these waters to produce power are well established and financially responsible. Demand for electricity there produced will increase. The raising of the lake level creates a storage reservoir, of which petitioners' lands form a part,

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[2]Petitioner Olson, as stated in the condemnation petition, owns, as part of a homestead, 55.21 acres below contour 1064. He claimed $300 per acre, making in all $16,563. The commissioners awarded $1,296.50, including $40 for damage to dock and wharf. The jury's verdict was $490.

Petitioner Karlson, as stated in the condemnation petition, owns 163.65 acres below contour 1064. It lies in two parcels, one of which, 120 acres, he bought in 1921 for $175, or about $1.45 per acre. He claimed $275 per acre, or a total of about $44,000. The commissioners made but one award, $3,660. The jury's verdict was $880.

Petitioner Brewster, as stated in the condemnation petition, owns as part of his homestead 98.55 acres (exhibits indicate this should be about 156 acres) below contour 1064. Though contiguous, it is listed as three parcels. He claimed $300 per acre, making in all $46,965. The commissioners awarded $640.70 for one parcel of 32.15 acres and $3,195.80 for the remainder, about 124 acres, making in all $3,836.50. The jury's verdict for all three was $900.

that serves to increase potential capacity by about 200,000 continuous horse power which is worth more than one million dollars annually. Competition exists for the right to develop and control that capacity, the value of which is so great that one or another of the competitors would have acquired the flowage rights if the United States had not done so. It is entirely practicable for private enterprises to acquire flowage easements. Publicity, long given to the great value of the lake as a storage reservoir, created a demand and affected the market value of shorelands needed for that purpose. And, in connection with the facts above stated, petitioners offered to prove the fair market values of their lands before and after the imposition of the flowage easement, taking into consideration all the facts and circumstances affecting market prices.

Respondent, having obtained leave to establish foundation for objection to petitioners' offers to prove, introduced evidence of the following facts:

The main shore line of the Lake of the Woods, including the affected reaches of the Rainy river, exceeds 1035 miles of which more than 110 are in Minnesota. There are in the lake a number of islands of a mile or over in length and approximately 10,000 smaller ones. The shorelines of the islands exceed 1180 miles of which about 20 miles are in Minnesota. Below sea-level datum 1064, established by the treaty, there are about 850 parcels owned by more than 775 individuals. If mortgagees and other claimants are counted, the number to be dealt with is not less than 1225 persons. Of these, only 496 live on or near the land, 186 live elsewhere in Minnesota, and 123 in other parts of the United States and Canada. The addresses of 401 are unknown. The United States owns a considerable part—about one-fifth—of the shore line in Minnesota. Small areas are held under homestead entries. The State of Minnesota owns a small piece subject to contracts of sale.

And it was made to appear:

None of the 35 miles of shorelands in Manitoba, of which about 14,427 acres lie below contour 1064, are privately owned. In 1915 they were reserved by the Dominion in anticipation of action by the International Joint Commission to regulate lake levels, and in 1930 they were transferred to the Province. In Ontario more than 700 persons own shorelands. In 1920 that Province, in accordance

with the recommendations of the Commission, withdrew its lands below the established level—about 13,043 acres—from private entry. On the Canadian side about 40 Indian reservations include 8,600 acres below the established level along about 250 miles of shoreline. These lands may be disposed of only with the assent of a majority of the male members of the band of the full age of 21 years at a meeting summoned for that purpose according to the rules of the band, and subject to the approval of governmental authority.

The Lake of the Woods is one of the water communications which by the Webster-Ashburton Treaty is required to be free and open to the use of the citizens and subjects of both countries. Its usefulness for navigation is a matter of great concern. The United States is interested in navigation and in the protection of owners of shorelands on the American side rather than in the development of power in Canada. The levels controlled by dams in the outlets were regulated by Canadian authority until the creation of an international regime in pursuance of the Treaty of 1925. Regulation has not been exclusively for the production of power but, so far as practicable, for the protection of all interests, including navigation, logging, domestic use of water, irrigation and power.

The trial court, being of opinion that under the circumstances neither the use nor the special adaptability of petitioners' lands for reservoir purposes could be considered in determining their market value, excluded the evidence offered by the petitioners. He instructed the jury first to determine as to each piece of land its fair market value on May 4, 1929—before the easement was imposed—taking into consideration the fact that prior to the taking the Government had the right to maintain the level of the lake up to 1059 sea-level datum (that may be taken as the natural level); next to find the fair market value after the taking, and that the difference is the amount for which the Government is liable. To guide the jury in the ascertainment of such values, the court charged: "You will take into consideration all of the uses for which the property was available on May 4, 1929, and May 5th, 1929, and determine what use it was most valuable for, and base your award thereon; but you will not make an award based on any claim for reservoir value. I have held that under the law the value of these lands could not be based upon the use of the lake

and its shores for reservoir purposes. It is, as I understand it, conceded that the only other use for which these lands are suited, with the exception perhaps of Mr. Olson's tract, is for agricultural purposes, or purposes relating to agriculture, so that it is for those purposes that you are to value these lands". The court suggested that petitioner Olson's lands might be used for fishing purposes and instructed the jury, if it so found, to "add to the value which it might have for agricultural purposes, any added value which might accrue to it, because of its usefulness as a fishing station". Under these instructions the Government was not entitled to, and it has not claimed, lesser awards because of diminution of valne caused by the unauthorized flooding of petitioners' lands. The owners were severally entitled to the compensation then due as if no such trespass had been committed.

The rule prescribed by the Minnesota constitution is not, at least so far as concerns these cases, to be distinguished from that expressed by the just compensation clause of the Fifth Amendment and implied in the due process clause of the Fourteenth Amendment to the Federal Constitution. The judicial ascertainment of the amount that shall be paid to the owner of private property taken for public use through exertion of the sovereign power of eminent domain is always a matter of importance for, as said in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 324: "In any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government". The statement in that opinion (p. 326) that "no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner" aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property for public purposes.' *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 399.

That equivalent is the market value of the property at the time of the taking contemporaneously paid in money. *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 306. *Jacobs* v. *United States,* 290 U. S. 1, 17. 2 Lewis, Eminent Domain, 3rd ed., § 682, p. 1172. It may be more or less than the owner's investment. He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have

changed substantially while held by him. The return yielded may have been greater or less than interest, taxes and other carrying charges. The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain. *Vogelstein & Co.* v. *United States*, 262 U. S. 337, 340. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and federal constitutions. *The Minnesota Rate Cases*, 230 U. S. 352, 454.

Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. *Boom Co.* v. *Patterson*, 98 U. S. 403, 408. *Clark's Ferry Bridge Co.* v. *Public Service Commission*, 291 U. S. —, —. 2 Lewis, Eminent Domain, 3rd ed., § 707, p. 1233. 1 Nichols, Eminent Domain, 2d ed., § 220, p. 671. The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value. Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service. *New York* v. *Sage*, 239 U. S. 57, 61. It is common knowledge that public service corporations and others having that power frequently are actual or potential competitors not only for tracts held in single ownership but also for rights of way, locations, sites and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account. *Boom Co.* v. *Patterson*, *ubi supra*. But the value to be ascertained does not include, and the owner is not entitled to compensation for, any element resulting subsequently to

or because of the taking. Considerations that may not reasonably be held to affect market value are excluded. Value to the taker of a piece of land combined with other parcels for public use is not the measure of or a guide to the compensation to which the owner is entitled. *New York* v. *Sage, ubi supra.* *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76, 80. *Shoemaker* v. *United States*, 147 U. S. 282, 305. *Kerr* v. *South Park Commissioners*, 117 U. S. 379, 386. *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, 65 F. (2d) 297, 304. The use of shorelands for reservoir purposes prior to the taking shows merely the physical possibility of so controlling the level of the lake. But physical adaptability alone cannot be deemed to affect market value. There must be a reasonable possibility that the owner could use his tract together with the other shorelands for reservoir purposes or that another could acquire all lands or easements necessary for that use. The trespass committed by means of the dams added nothing to the value of the shorelands.

Flowage easements upon these lands were not currently bought or sold to such an extent as to establish prevailing prices, at or as of the time of the expropriation. As that measure (*United States* v. *New River Collieries*, 262 U. S. 341, 344) is lacking, the market value must be estimated. In respect of each item of property that value may be deemed to be the sum which, considering all the circumstances, could have been obtained for it; that is, the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 124. The determination is to be made in the light of all facts affecting the market value that are shown by the evidence taken in connection with those of such general notoriety as not to require proof. Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth. Cf. *The Minnesota Rate Cases, supra*, p. 452. *Smith* v. *Illinois*

Bell Tel. Co., 282 U. S. 133, 152. *Los Angeles Gas Co.* v. *R. R. Comm'n*, 289 U. S. 287, 319.

Petitioners rely on *Boom Co.* v. *Patterson*, 98 U. S. 403. At the time of that condemnation, logs belonging to many owners were floated down the Mississippi to sawmills at and below the Falls of St. Anthony. Patterson owned three islands, about 34 acres, in the river a few miles above the falls, lying near to each other and approximately parallel to the west bank. The company, merely by closing the spaces between the islands and connecting the downstream end to the bank so as to prevent the passage of floating logs, created a boom about a mile long and a quarter of a mile wide. The owner objected to that use of his property and the company condemned. There was evidence of value other than for boom purposes and also of value for all purposes. The jury specially found that aside from boom purposes the value of the land was $300 and that, in view of the adaptability for boom purposes, it had an additional value of $9,058.33. There was a general verdict for the sum of these amounts. The court ordered the verdict set aside unless the owner consent to reduce it to $5,500. He did consent and judgment was entered for that amount.

Upon appeal this court affirmed and, speaking through Mr. Justice Field, said (p. 407-409): "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted . . . . The position of the three islands . . . fitting them to form, in connection with the west bank . . . a boom of immense dimensions . . . added largely to the value of the lands. . . . Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands. We do not understand that all persons, except the plaintiff in error, were precluded from availing themselves of these lands for the construction of a boom, either on their own account or for general use. . . ". . . The Mississippi is a navigable river above the Falls of St. Anthony, and the State could not confer an exclusive use of its waters, or exclusive control and management of logs floating on it, against the consent of their owners."

The principle governing that case has been frequently applied here[3] and in the lower federal courts.[4] The decision is authoritative in state courts in all condemnation cases in which the owner invokes protection of the due process clause of the Fourteenth Amendment.[5] But clearly it does not support petitioners' contention here. The circumstances there disclosed required submission to the jury of the question whether the use and special adaptation of the islands for boom purposes affected market value at the time of the taking. They were amply sufficient to warrant a finding that the islands were well suited and presently needed for that purpose and that demand for them, actual or prospective, to form a part of a boom greatly enhanced their market value. The boom company could not exclude others from handling logs floated in the river. The owner and others had the right to use the island lands to construct a boom for their own purposes or for general use.

The situation in respect of lands bordering the Lake of the Woods is essentially different. The fact that the raising of the lake would take or damage shorelands could not affect their market value. There could be no rational basis for any demand that would affect value to the owner for reservoir purposes unless, as a legal and practical possibility, he or some other person or persons—

[3]Chicago, Burlington &c. R'd *v.* Chicago, 166 U. S. 226, 250. Boston Chamber of Commerce *v.* Boston, 217 U. S. 189, 195. United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 77. McGovern *v.* New York, 229 U. S. 363, 372. The Minnesota Rate Cases, 230 U. S. 352, 451. Vogelstein & Co. *v.* United States, 262 U. S. 337, 340. United States *v.* New River Collieries, 262 U. S. 341, 344. Mitchell *v.* United States, 267 U. S. 341, 345.

[4]Murhard Estate Co. *v.* Portland & Seattle Ry. Co., 163 Fed. 194, 199. Weiser Valley Land & Water Co. *v.* Ryan, 190 Fed. 417, 421-422. Denver & R. G. R. Co. *v.* Mills, 222 Fed. 481, 489. Northern Pac. Ry. Co. *v.* North American Tel. Co., 230 Fed. 347, 356. North American Telegraph Co. *v.* Northern Pac. Ry. Co., 254 Fed. 417, 419. United States *v.* Boston, C. C. & N. Y. Canal Co., 271 Fed. 877, 893. Ford Hydro-Electric Co. *v.* Neely, 13 F. (2d) 361, 362. Guste *v.* United States, 55 F. (2d) 115, 116.

[5]Illustrative cases are: Fales *v.* Easthampton, 162 Mass. 422, 425. Smith *v.* Commonwealth, 210 Mass. 259, 261. North Shore R. R. Co. *v.* Penna. Co., 251 Pa. 445, 450. R. I. & P. Ry. Co. *v.* Leisy Brewing Co., 174 Ill. 547, 555. Currie *v.* Waverly, &c., R. R. Co., 52 N. J. L. 381, 396. Russell *v.* St. Paul, Minneapolis & Manitoba Ry. Co., 33 Minn. 210, 214. Conan *v.* City of Ely, 91 Minn. 127, 131. Santa Ana *v.* Harlin, 99 Cal. 538, 542. Alloway *v.* Nashville, 88 Tenn. 510, 519.

other than the expropriating authority—could have acquired the right to flow the lands necessary for the lawful raising of the lake. The lands upon which the flowage easement is condemned are located in two countries. Neither could authorize expropriation in the other. Petitioners did not cite or offer evidence of any instance of acquisitions, without reliance upon the power of eminent domain, that are at all comparable with those under consideration. When regard is had to the number of parcels, private owners, Indian tribes and sovereign proprietors to be dealt with, it is clear that there is no foundation for opinion evidence to the effect that it was practicable for private parties to acquire the flowage easements in question.

The policy of joint governmental control of the lake levels was indicated years before the taking. The lands in Manitoba and Ontario that long prior to the condemnation were reserved in anticipation of measures to be taken for the raising of the lake level were essential to the enterprise. Additional reservoir capacity could not lawfully be created without them and they could not be purchased or condemned. There was no justifiable basis for competition for the purchase of flowage rights from private owners. Rivalry between power companies or others to secure opportunity to develop capacity resulting incidentally from lake levels established in the settlement of, or to prevent, controversy between the parties to the treaty or between either of them and nationals of the other is too remote to warrant a finding that market value of petitioners' lands was thereby enhanced. It had no direct, and could have no substantial or legitimate, influence upon such value.

As just compensation includes no increment resulting from the taking, petitioners were not entitled to elements of value arising from the prospect that the Government would acquire the flowage easements. Under the circumstances, intention to acquire was the equivalent of the formal designation of the property to be taken. Prices actually paid, and estimates or opinions based, upon the assumption that value to owners includes any such elements are not entitled to weight and should not be taken into account. On the facts shown, it conclusively appears that there was no element of value belonging to petitioners that legitimately could be attributed to use and adaptability of their lands for

reservoir purposes. The evidence covered by petitioners' offers was inadmissible. The court rightly excluded reservoir uses from consideration.

In their brief, petitioners complain that the trial court instructed the jury "to consider only the value of the lands for agriculture, although it was admitted that the lands were not suitable for agriculture and had never been used for that purpose". The parts of the charge above quoted show that the statement is without foundation as to Olson's land and inaccurate as to all. The record definitely shows that petitioners did not claim that, except for reservoir purposes, their lands are worth more than their value for agriculture. Moreover, the point is not made in the specification of errors or in the reasons given in the petition for this writ. The contention is not properly before us. *Gunning* v. *Cooley*, 281 U. S. 90, 98.

Petitioners maintain that the Circuit Court of Appeals erred in holding that the Treaty of 1909 did not give redress, and that they had no remedy, for the wrongful flooding of their lands. The statements in the opinion assailed by specifications of error in petitioners' brief were made *arguendo* and do not constitute decision of any point on which petitioners there sought reversal. The questions considered below concerned compensation for flowage easements. The condemnation was under section 1 of the Act of May 22, 1926, *supra*. The property taken was the right to use in the future. The commissioners were not authorized to make any award on account of damages caused by unlawful flooding of shorelands prior to the taking. That is clear from section 1, and especially so when its provisions are read in connection with the general condemnation Act of August 1, 1888, 25 Stat. 357, and the rule of just compensation prescribed by the Constitution of Minnesota, both of which are expressly adopted by that section. Moreover, section 3 directs the Secretary of War to deal with all claims for damages caused, prior to the acquisition of flowage easements under this Act, to the inhabitants of the United States by fluctuation of the water levels of the Lake of the Woods due to artificial obstructions in the outlets. No question of liability for, or the amount of, such damages was before the lower courts.

Judgments affirmed.